Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1164

DR. N. JAY ROGERS, O. D. and W. J. DICKINSON, Individually and as President of the TEXAS SENIOR CITIZENS ASSOCIATION, PORT ARTHUR, TEXAS CHAPTER,
Appellants

v.

DR. E. RICHARD FRIEDMAN, O. D., DR. JOHN B. BOWEN, O. D., DR. HUGH A. STICKSEL, JR., O. D., DR. JOHN W. DAVIS, O. D., DR. SAL MORA, O. D., Individually and in their official capacity as members of THE TEXAS OPTOMETRY BOARD; and THE TEXAS OPTOMETRIC ASSOCIATION, INC.,
Appellees

On Appeal from the United States District Court for the Eastern District of Texas (Three-Judge)

JURISDICTIONAL STATEMENT

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DR. E. RICHARD FRIEDMAN, O. D., DR. JOHN B. BOWEN, O. D., DR. HUGH A. STICKSEL, JR., O. D., DR. JOHN W. DAVIS, O. D., DR. SAL MORA, O. D., Individually and in their official capacity as members of THE TEXAS OPTOMETRY BOARD; and THE TEXAS OPTOMETRIC ASSOCIATION, INC.,
Appellees

On Appeal from the United States District Court for the Eastern District of Texas (Three-Judge)

JURISDICTIONAL STATEMENT

Appellants appeal from that limited portion of the judgment entered October 27, 1977 by a three-judge court of the United States for the Eastern District of Texas upholding the constitutionality of Section 2.02 of the Texas Optometry Act, article 4552, Revised Civil Statutes of Texas, and denying the prayer for injunction prohibit-

ing the enforcement of said statute, and submit this statement to show that the Supreme Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 438 F.Supp. 428. The opinion and judgment are reproduced as Appendix A.

JURISDICTION

This suit was brought under the First and Fourteenth Amendments of the United States Constitution together with 28 U.S.C. §§ 1331, 1343(3) and (4), 2201, 2281, and 2284 and 42 U.S.C. § 1983. The judgment of the District Court was entered October 27, 1977 and notices of appeal were filed in that court by Appellants on December 21, 1977. Copies of said notices of appeal are attached hereto as Appendix B. On December 20, 1977 and December 22, 1977, Appellees also filed notices of appeal.

This appeal is from a final order of a three-judge court properly constituted under 28 U.S.C. § 2281, denying in part requested injunctive relief restraining the enforcement of a state statute.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960); *Campbell v. Hussey*, 368 U.S. 297, reh. den. 368 U.S. 1005 (1961); *Carter v. Stanton*, 405 U.S. 669 (1972).

QUESTIONS PRESENTED

1. Does § 2.02 of the Texas Optometry Act, by requiring that two-thirds of the Texas Optometry Board be members of the Texas Optometric Association, deprive Appellant, Dr. Rogers, of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution?

2. Is the determination of the district court that there is a rational basis for § 2.02's classification of optometrists according to their membership in a particular organization clearly erroneous and refuted by the evidence?

3. Does § 2.02 of the Texas Optometry Act, by requiring that two-thirds of the Texas Optometry Board be members of the Texas Optometric Association, deprive Appellant, Dr. Rogers, of due process of law as guaranteed by the Fourteenth Amendment?

4. Does the requirement of § 2.02 that two-thirds of the Texas Optometry Board be members of the Texas Optometric Association operate indirectly to infringe upon the Appellants', Texas Senior Citizens Association, Port Arthur, Texas Chapter, First Amendment rights to receive valuable commercial information?

STATUTES INVOLVED

Sections 2.02, 2.09, 2.10, 2.14, 3.01, 3.06, 3.07 and 4.04 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas are reproduced as Appendix C.

STATEMENT OF THE CASE

Section 2.02 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas, hereinafter re-

ferred to as the Act, requires that two-thirds of the Texas Optometry Board be "members of a state optometric association which is recognized by and affiliated with the American Optometric Association". The Texas Optometry Board, hereinafter referred to as the Board, is the state regulatory body charged with supervision of the practice of optometry in the State of Texas. The Act provides that the Board may bring suit in its own name to enjoin any violation of the Act, § 2.10, and gives the Board the power to hold hearings and issue subpoenas concerning matters within its jurisdiction. § 2.10. The Board is charged with examining candidates for licenses, §§ 3.01 and 3.06, and determining who shall be licensed to practice optometry. § 3.07. The Board is also given the power to revoke the license of a practicing optometrist. § 4.04. While the Board has no rule making authority, § 2.14, the Board has adopted the practice of issuing "Interpretations" of the provisions of the Act.

The *only* state optometric association in Texas that is recognized by and affiliated with the American Optometric Association is the Texas Optometric Association, Inc., hereinafter referred to as TOA. Thus, two-thirds of the members of the Texas Optometry Board *must* be members of TOA. On May 12, 1976, there were 934 licensed Texas optometrists residing in Texas and of that figure only an outside *maximum* of 482, or 52%, were TOA members actively engaged in the practice of optometry. Even though only half of the state's optometrists are members of TOA they are insured of a perpetual two-thirds majority on the Texas Optometry Board.

The relatively even split between TOA optometrists and non-TOA optometrists reflects the decades old con-

flict between two Texas and national optometric factions over the mode of practice. The Alabama and Georgia representatives of these competing factions in the practice of optometry were the parties in interest in the cases of *Gibson v. Berryhill,* 411 U.S. 564 (1973) and *Wall v. American Optometric Association, Inc.,* N.D. Ga. 1974 (3-Judge Court), 379 F.Supp. 175, aff'd 419 U.S. 888 (1974). Most TOA members are members of the faction that prefers to refer to its members as "professional" optometrists. The "professional" optometrists have always vigorously insisted that commercial merchandising techniques have no place whatever in the rendition of quality visual health care. This view point is crystallized in the American Optometric Association (AOA) Code of Ethics and Rules of Practice, which rules are recognized and enforced by TOA and which prohibit any form of advertising, whether it is price advertising or use of any other commercial merchandising techniques. AOA Code of Ethics, III Section C. (Exhibits 25 and 26 to the deposition of Dr. N. Jay Rogers). Thus, all TOA members are prohibited from utilizing any form of advertising and an optometrist may not become a member of the TOA if he advertises.

The opposing faction is comprised of the "commercial" optometrists of whom Dr. Rogers is a successful and respected pioneer. Key characteristics of "commercial" optometry include the practice of optometry in multiple offices and under trade names, the use of media advertising, including price advertising, of opthalmic goods and services, an efficient and economical division of professional and para-professional patient services, generally far lower prices to the public, and less "professional" appearing locations, offices and office procedures. Because of their

mode of practice, the "commercial" optometrists of Texas, including plaintiff, historically have been ineligible for AOA and TOA, and remain ineligible to this day for AOA and TOA membership due to their non-conformity to the restrictions set forth in the AOA Code of Ethics and Rules of Practice.

This dispute between the two factions is confined to questions of modes of business in an economic sense and is not related to any questions concerning patient care. There is no dispute over the proper way to examine a patient's eyes or how to prescribe for a particular eye disorder. (Deposition of Dr. Sal Mora, at pp. 10-11, taken on February 5, 1976). In fact, § 5.12 of the Act requires that all eye examinations shall include certain steps. Even Dr. Richard Friedman, a past president of the TOA and a defendant herein as a member of the Board, testified that there is no disagreement between the two factions as to proper examination for refraction or prescription. (Deposition of Dr. Richard Friedman, at pp. 14-15, hereinafter Friedman depo.).

On August 25, 1975, Appellant, Dr. N. Jay Rogers, O. D., brought this case against the remaining five members of the Texas Optometry Board pursuant to, *inter alia*, 42 U.S.C. § 1983 and 28 U.S.C. § 1343, § 2281 et seq., assailing the constitutionality of § 2.02 of the Act on the grounds that such an arbitrary and irrational classification violates his Fourteenth Amendment rights to equal protection of the laws and due process of law. Fourteenth Amendment attacks on § 5.13(d) and § 5.15 (e) of the Texas Optometry Act were also made. The convocation of a three-judge district court and a permanent injunction against enforcement of these statewide

statutes were sought. A three-judge court was properly convened pursuant to 28 U.S.C. § 2281 to consider the substantial federal constitutional claim stated in Dr. Rogers' complaint.

On June 11, 1976 a Complaint in Intervention was filed by W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, hereinafter referred to as Senior Citizens, joining Dr. Rogers in his attack on the constitutionality of §§ 2.02, 5.13(d) and 5.15(e) of the Act raising First and Fourteenth Amendment grounds, and also attacking the constitutionality of § 5.09 of the Texas Optometry Act which prohibits price advertising by optometrists on the grounds that such prohibition of advertising denies intervenor's protected First Amendment right to receive valuable commercial information.

On September 13, 1976, the Texas Optometric Association, Inc. filed a petition in intervention in support of the defendant, Texas Optometry Board members.

On October 27, 1977, the three-judge court entered its final judgment restraining and enjoining the defendants from enforcing § 5.09(a) and § 5.13(d) of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas and declaring those sections unconstitutional under the First Amendment of the United States Constitution. The court held that § 5.15(e) does not violate the First Amendment and that the § 2.02 of the Act does not violate the First and Fourteenth Amendments of the United States Constitution since there are several rational bases for the classification and denied injunctive relief.

Plaintiff and intervenor filed a notice of appeal as to that portion of the judgment upholding the constitutionality of § 2.02 and § 5.15(e) of the Act. However, Appellants would dismiss their appeal from that portion of the judgment upholding the constitutionality of § 5.15 (e) since the court has construed that section as having the clear purpose of encouraging the free flow of commercial information to consumers. Appellants reserve the right to again question the validity of § 5.13(e) should the Texas Optometry Board or the courts of the State of Texas construe the section so as to restrict the free flow of commercial information to consumers.

In upholding the arbitrary classification of § 2.02 that gives a particular special interest group control over the practice of optometry in Texas, the three-judge court deferred to three "rational bases for the requisite board composition" that were suggested by TOA. 438 F.Supp. at 432. However, the evidence produced at trial, including much evidence that came directly from TOA members, effectively refutes all of the proferred "rational bases".

First, as to the assertion that TOA members are more likely to be economically independent than non-TOA members, Dr. Hugh Sticksel, Jr., one of the defendants, testified that a TOA member who is practicing in affiliation with other TOA members could be subjected to economic control from the other TOA members just as a non-TOA member might be subject to economic control from other individuals. (Deposition of Dr. Hugh Sticksel at 43-47). Dr. Sticksel's testimony indicates that if economic independence is the basis for distinguishing between optometrists the only rational distinction would

be between a solo practitioner and a practitioner who is affiliated with other individuals and that a TOA member is subject to economic controls just as a non-TOA member.

Second, the assertion that TOA members are more prone than others to enforce the Optometry Act is also clearly refuted by the evidence. Dr. Richard Friedman, chairman of the Texas Optometry Board and former president of the TOA testified that the fact of membership in the TOA does not make an optometrist more likely to enforce the law. (Friedman depo. at 55). In fact, Dr. Friedman testified that he routinely violated § 5.15(e) of the Act by failing to inform the patients that they could take their prescription to a dispensing optician. He testified that this Board, with a four member TOA majority, has never taken any action for violation of § 5.15(e) even though he believed very few optometrists were following the requirements of this section. (Friedman depo. at 114-115). There can be no more graphic proof that TOA members are as likely as any other optometrist to be lax in the enforcement of the Act when it is in their economic self-interest to do so.

Third, the assertion that TOA members are more likely to emphasize the highest quality of eye care as opposed to the non-TOA member is equally without basis in the evidence. Dr. Friedman testified that he would expect a patient to get the same proper examination or refraction and prescription at Dr. Rogers' office as that patient would at Dr. Friedman's office. (Friedman depo. at 14-15). But there was even more telling evidence at trial that reflects the true emphasis that the TOA places on the highest quality of eye care. As of May 11, 1968, the

TOA implemented a Practice Evaluation System for membership in the TOA. (Exhibit to the affidavit of Stanley Boysen). That system has a maximum of 100 points that can be amassed and if a minimum of 70 points are amassed an optometrist can qualify for membership. Of the points that can be scored an optometrist can receive 10 points for meeting the minimum standards for visual examination promulgated by statute and 6 points for attending a *TOA approved* educational meeting annually. Thus, of 100 points only 16 directly relate to the actual quality of eye care provided by the optometrist. The other 86 possible points show the true emphasis of the TOA. For example, an optometrist can score 25 points for officing in a "professional" location but only 5 points for any other street location with "unprofessional" signs and "public presentations" as displays. An optometrist can score 20 points for no "unprofessional media releases". However, an optometrist fully exercising his protected First Amendment right to advertise would be entitled to no points at all and only six points if he advertises in every medium except radio and television. Ten points can be scored if only "professional" signs are used, 15 points for no displays, and 10 points for practice only in the optometrist's own name. Clearly, the emphasis is on creating the "professional" facade for the practice of optometry and not on quality eyecare.

The asserted rational bases for giving TOA members a perpetual two-thirds majority on the Optometry Board clearly have no basis in the evidence. The evidence produced at trial established that there could be no conceivable rational basis for the classification of optometrists

on the basis of membership in a particular organization and that the statutory classification is wholly arbitrary.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are closely related to the issues involved in the case of *Gibson v. Berryhill*, 411 U.S. 564 (1973). The primary issue in *Gibson* concerned the propriety of individuals with substantial pecuniary interest (members of the Georgia Optometric Association which is the equivalent to the TOA) adjudicating matters concerning other members of the profession, the non-GOA optometrists. Such pecuniary interest was held to deny the appellants their right to procedural due process of law.

While this case does not involve pending or immediately threatened license revocation proceedings it does address the broader question of whether a legislative classification that mandates that two-thirds of the Texas Optometry Board be members of a particular special interest organization operates to deny the other members of the profession their protected Fourteenth Amendment rights to the equal protection of the laws and due process of law in that the classification infringes on their rights to associate to exercise political influence on the Board and is wholly arbitrary.

This appeal also addreses the important constitutional question of whether a state may impose a regulatory scheme on a profession that has the indirect effect of impairing the rights of consumers to receive valuable commercial information.

I. Section 2.02 Denies Appellant the Equal Protection of the Laws.

Section 2.02, in giving the TOA a perpetual two-thirds majority on the Board, has created a classification based solely on membership or non-membership in a particular organization. The statute itself does not prohibit optometrists from forming other organizations to promote their goals and ideals concerning the proper mode of practice for optometrists. However, the statute does insure that any organization other than the TOA will always have to deal with a regulatory board that is dominated by a particular group's viewpoint.

In *Williams v. Rhodes*, 393 U.S. 23 (1968) a statutory scheme that discriminated against minority political parties was held to be a violation of the Equal Protection Clause as a denial of the right to association since "the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes". 393 U.S. at 31. In the same way, the rights of optometrists to organize to express their goals, both political and professional, mean little if they are to be forever governed by a Board with a TOA majority.

While *Williams* arose in the context of the political process the right to associate is not limited to the political arena. In a far different context, the right to associate was held to have been denied by a prohibition against the unauthorized practice of law that prevented a union from employing attorneys to assist its members in legal matters. *United Mine Workers v. Illinois Bar Assoc.*, 389 U.S. 217 (1967).

The State may infringe on First Amendment rights only when it shows a compelling state interest in doing so. *Williams v. Rhodes*, 373 U.S. at 31. The state would assert that it has a legitimate interest in regulating the optometric profession and that the statutory classification is imposed to maintain quality eye care and prevent economic tie-ins. However, the means the state uses cannot be permitted to encroach upon significant First Amendment rights when less restrictive means are available to satisfy its interests. *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973). Section 2.02 already prohibits optometrists from serving on the Board if they are members of the faculty at a college of optometry or if they are agents of or have financial interests in any wholesale optical company. The state could legitimately place other restrictions on who may serve as Board members such as limiting the Board members to individuals who have practiced for a specified number of years. Such restrictions, that would apply to all optometrists equally, are available to the state to further its interests. The state may not, however, further its interests at the expense of important associational freedoms as it has done.

The statutory two-thirds majority given to the TOA insures that the practice of optometry in Texas will continue to be dominated by individuals who are unalterably opposed to any form of advertising by optometrists. While the Board can no longer rely on a statutory prohibition of advertising as a ground for revocation of the license of an optometrist there remain many other grounds for the Board to institute revocation proceedings. The TOA-dominated Board can still use advertising as the trigger that prompts them to investigate an optometrist

to see if he has run afoul of any statutory requirements. The unequal treatment of the statutory scheme that gives a favored position to an organization that is violently opposed to advertising will certainly have a "chilling effect" on an optometrist's exercise of his First Amendment right to advertise. When such an optometrist advertises he is in effect challenging a basic belief of the TOA Board members and must be prepared to bear the force of their reaction to that challenge. That impact on First Amendment freedoms can be tolerated only when the state can show the most compelling interest and the state has not produced any evidence of a compelling interest to justify the unequal treatment afforded to non-TOA optometrists. Section 2.02 therefore denies Appellant the equal protection of the laws.

II. The Determination That There is a Rational Basis for § 2.02 is Clearly Erroneous.

Although Appellant maintains the § 2.02 can be upheld only if the state shows a compelling interest, the district court applied only a "rational basis" test and determined that there was a rational basis for the statutory classification. Without conceding the appropriateness of such a test in this case, the determination of the district court was not supported by the evidence at trial. The evidence produced by the plaintiff negatived every conceivable basis for the statutory distinction between TOA and non-TOA optometrists, as discussed more fully, supra, and the evidence establishes that the classification is wholly arbitrary. *New Orleans v. Dukes*, 427 U.S. 297 (1976). The determination of the district court that

there is a rational basis for the classification is clearly erroneous and must be overturned.

III. Section 2.02 Denies Appellant Due Process of Law.

Section 2.02 presents a statutory scheme that insures that in any license revocation proceeding a non-TOA optometrist will be judged by a predominately TOA Board whose members have substantial pecuniary interests at stake. Under the rationale of *Gibson v. Berryhill, supra,* any such proceeding would violate procedural due process. While this case does not arise in the context of adjudicatory proceedings the factual similarities between this case and *Gibson* are substantial with the TOA occupying virtually the same position as the Alabama Optometric Association did in *Gibson* and possessing the same interest in inhibiting the commercial practice of optometry for their own economic gain. There is no way to handle any future disciplinary hearing to avoid this procedural due process defect in the Board's composition. Therefore, the procedural due process issue is ripe for review and § 2.02 is due to be permanently enjoined.

The procedural due process defects are not the only due process defects with § 2.02. The statute, in effect, creates an irrebuttable presumption that non-TOA members are less qualified to serve on the Board than TOA members. Fitness for service on the Board is conclusively established by membership in a particular organization. Such a scheme invidiously discriminates against the non-TOA optometrists, denying them their fundamental right of association and denying them due process of law.

NAACP v. Alabama, 357 U.S. 449 (1958). These associational rights are protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference". *Bates v. Little Rock*, 361 U.S. 516, 523 (1960).

When a statutory scheme arbitrarily favors one class of similarly situated optometrists over another and operates to infringe upon the associational rights of the optometrists it is due to be enjoined as a violation of due process of law. *Vlandis v. Kline*, 412 U.S. 441 (1973), *United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973) and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

It is no answer to this denial of due process to say that there is no fundamental right to serve on the Board or even that there is no fundamental right to practice optometry. While such a statement is obviously true, the State may not condition the right to practice optometry or the privilege to serve on the Board on the abdication of an optometrist's First Amendment rights to freely associate with others to further their own ideals and goals. *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967) and *Baird v. Arizona*, 401 U.S. 1 (1971).

In *Keyishian*, a New York statute that made Communist Party membership prima facie evidence, (or a rebuttable presumption) of disqualification for a teaching position was struck down as an overbroad denial of associational rights which may not be proscribed. In this case the presumption is irrebuttable that a non-TOA optometrist is not as qualified to serve as a TOA-optometrist and operates to proscribe associational rights as

surely as did the statute in *Keyishian*. The non-TOA optometrist is thus denied due process of law and § 2.02 must be permanently enjoined.

IV. Section 2.02 Infringes Upon Appellant's First Amendment Rights.

The three-judge court held that Section 5.09(a) of the Texas Optometry Act is unconstitutional under the First Amendment insofar as it prohibits any optometrist from making "any statement or advertisement of price of optometric services or materials". This holding was based on *Bates v. State Bar of Arizona*, ____ U.S. ____, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) which clearly was controlling. None of the defendants in this case has appealed from the judgment of the three-judge Court as it pertains to advertising by optometrists.

However, the court's judgment on advertising by optometrists will prove to be only an illusory victory as long as the TOA maintains its statutory two-thirds majority on the Texas Optometry Board. The TOA members of the Board will be individuals who are bound by a Code of Ethics that prohibits them from advertising. They, in turn, have the power to determine which individuals will be allowed to practice optometry in Texas. While the statutes will no longer give them the power to revoke the license of an optometrist simply because he advertises, an optometrist's knowledge that the members of the Board who will sit in judgment of his action are unalterably opposed to and prohibited from advertising will certainly weigh heavily in his decision on whether or not to advertise.

The TOA majority on the Board promulgated an interpretation of § 5.09 that extended beyond the scope of that statute. The vote on that interpretation, Interpretation No. 6, was four to two with the four TOA members of the Board voting for the Interpretation. That vote graphically illustrates that the TOA members are so opposed to advertising that they found it necessary to enlarge upon the anti-advertising statute passed by the legislature. As long as the TOA retains its perpetual majority on the Board it can be expected to make further attempts through "Interpretations" to limit the protected First Amendment rights of optometrists to advertise and consumers to receive the valuable commercial information conveyed by advertising. The two-thirds majority for TOA members is an indirect restraint on the exercise of First Amendment rights by optometrists and correspondingly results in dilution of the Senior Citizen's right to receive commercial information. To prevent the First Amendment from becoming a "hollow promise", statutes that indirectly restrain First Amendment rights cannot be sustained even if they are purportedly enacted "for the purpose of dealing with some evil within the State's legislative competence or even because the laws do in fact provide a helpful means of dealing with such an evil". *United Mine Workers v. Illinois Bar Asso.*, 389 U.S. 217, 223 (1967). Since Section 2.02 serves as an indirect restraint on First Amendment rights of Appellants it cannot be sustained.

Appellants submit that § 2.02 of the Texas Optometry Act violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and infringes upon protected First Amendment rights. The questions pre-

sented by this appeal are substantial and they are of constitutional significance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing has been furnished to all interested parties this ____ day of February, 1978.

_____

APPENDIX A

Dr. N. Jay ROGERS, Plaintiff,

W. J. Dickinson, Individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, Intervenor,

v.

Dr. E. Richard FRIEDMAN, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, Dr. Sal Mora, Defendants,

Texas Optometric Association, Inc., Intervenor.

No. B-75-277-CA.

United States District Court,
E. D. Texas,
Beaumont Division.

Sep. 12, 1977.

* * *

Before GOLDBERG, Circuit Judge, and FISHER and STEGER, District Judges.

MEMORANDUM OPINION

By this civil action, filed pursuant to, *inter alia*, 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343, 2281, *et seq.*, Plaintiffs seek to enjoin on constitutional grounds enforcement of provisions of the Texas Optometry Act,

Tex. Rev. Civ. Stat. Ann. art. 4552-1.01, *et seq.*, by the Texas Optometry Board ("Board"). More specifically, Plaintiffs assert the following are violative of their constitutional rights under the first and fourteenth amendments: (1) the prohibition against price advertising, Vernon's Ann. Civ. Stat. art. 4552-5.09(a); (2) the mandatory colloquy between the optometrist and his patient regarding referral to an optician, Vernon's Ann. Civ. Stat. art. 4552-5.15(e); (3) the composition of the Board, Vernon's Ann. Civ. Stat. art. 4552-2.02; and (4) the forbiddance of practice under a trade name, Vernon's Ann. Civ. Stat. art. 4552-5.13(d).

[1] Vernon's Ann. Civ. Stat. art. 4552-5.09(a) provides in pertinent part that "[n]o optometrist shall publish or display . . . any statement or advertisement of any price offered or charged by him for any ophthalmic services or materials . . ." The recent decision of the Supreme Court in *Bates v. State Bar of Arizona*, ____ U.S.____, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), makes it clear, however, that any blanket suppression of truthful price advertising is a violation of the right of commercial free speech. The Court therefore holds that art. 4552-5.09(a) is violative of the First Amendment.

[2] The Texas Optometry Act further provides that "[n]o optometrist shall practice . . . optometry under, or use in connection with his practice of optometry, any . . . trade name . . . other than the name under which he is licensed to practice optometry in Texas. . . ." Vernon's Ann. Civ. Stat. art. 4552-5.13(d). As noted above, Plaintiffs have asserted that this article infringes on their constitutional rights. More particularly, they allege that it transgresses on their right to commercial free speech

under the first amendment.[1] In deciding a first amendment question, the Court's function is to balance competing interests. That is, it must weigh the purported justifications for the restriction in question against its deprivation of first amendment rights and the subsequent harm, if any. See generally *Konigsberg v. State Bar*, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961); *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

[3] In the instant case, Defendants assert that in the first amendment balancing test, any possible harm to the public is far outweighed by (1) the dangers to the doctor/patient relationship, (2) the deterioration of the quality of eye care, (3) the practical "concealment" of the optometrists' identity, and (4) the potential for deception and misrepresentation inherent in an assumed name practice. Based on the evidence and briefs before this Court, the Court finds Defendants' assertions unpersuasive. Although the Defendants rely extensively on supportive language contained in the decision of the Texas Supreme Court in *Texas State Board of Examiners in Optometry v. Carp*, 412 S.W.2d 307 (1967), this Court notes (1) the question before the Texas Court in *Carp* was not constitutional but whether the Texas board

1. Plaintiffs also assert infringement of their fourteenth amendment rights. This Court notes, however, that the Supreme Court has consistently upheld commercial regulations by states in the face of fourteenth amendment challenges where the state action was grounded in rational bases. See, *e. g., New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Since the Court feels, however, that the first amendment challenge is dispositive of this question, it does not address the fourteenth amendment arguments of the parties.

had exceeded its delegated power from the Legislature, (2) the names whose use were in question were those of licensed optometrists who sold Carp their locations, and (3) the *Carp* decision was rendered well before the recent Supreme Court pronouncements in *Va. Pharmacy Bd. v. Va. Consumer Council, supra*, and *Bates v. State Bar of Arizona, supra.*

In both the *Bates* and *Virginia Pharmacy* decision, in the process of striking down blanket suppression of truthful advertising, the Supreme Court addressed at great length the importance of commercial free speech in society. The Court declared in *Bates* that "the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Bates v. State Bar of Arizona, supra,* ____ U.S. at____, 97 S.Ct. at 2699. Further, that "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Ibid.* In *Virginia Pharmacy, supra* 425 U.S. at 765, 96 S.Ct. at 1827, the Court stated

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources . . . will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

There are two closely related arguments in the instant case for the inclusion of trade names within the protected

first amendment right of commercial free speech. The Court finds both persuasive. The first is that a "trade name" is encompassed within the meaning of advertising and thereby comes under the auspices of the first amendment protection recently granted to advertising by professional people. Therefore, it is argued that any blanket suppression of such commercial speech is unconstitutional. See *Bates v. State Bar of Arizona, supra.*

The argument for inclusion of trade names within the protective fold of advertising, is generally as follows: trade names, a common law right developed by virtue of being in business, grow as a result of the fact that people identify the name with a certain quality of service and goods, the end result being that eventually the name itself calls public attention to the product.

The second argument is that, even if a trade name is not an integral part of advertising per se, there is a first amendment right to the use of a trade name as part of the consuming public's right to valuable information. More specifically, that the Texas State Optical name [TSO] has come to communicate to the consuming public information as to certain standards of price and quality, and availability of particular routine services.

As stated above, the Court finds both arguments persuasive. Accordingly, this Court, applying the rationale of the advertising cases[2] to the trade name question, holds that blanket suppression of the use of trade names results in unwarranted restriction of the free flow of com-

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2. See *Bates v. State Bar of Arizona,* ____U.S.____, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

mercial information and therefore represents an unconstitutional violation of the first amendment.[3]

[4] Vernon's Ann.Civ.Stat. art. 4552-5.15(e) requires an optometrist, if he determines a patient needs lenses, to inform the patient (1) that the optometrist will prepare or have the lenses prepared according to the prescription, or (2) that the patient may have the prescription filled by any dispensing optician, not naming any particular optician, but should return for an optometrical examination of the lenses. The article further provides that "[i]f the patient chooses the first alternative, the optometrist may refer the patient to a particular dispensing optician. . . ."

Plaintiffs allege that this denies the optometrist the right under the First Amendment to furnish information as to where the patient can have his prescription filled, and that the patient is denied the right to obtain information from his optometrist as to where he can get his lenses made unless he accepts the statutorily required offer by the optometrist. Plaintiffs argue that the optometrist should be allowed to make a referral to a particular optician without the patient first requesting it. In addition, Plaintiffs allege a denial of equal protection because both opthamologists and osteopaths freely refer their patients

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3. The Court would point out (1) that it rejects the contention that the TSO name misleads the public as to who is the responsible optometrist, *generally see Bates v. State Bar of Arizona, supra,* _____U.S. at_____, 97 S.Ct. 2691, and (2) the fact that blanket suppression of a trade name is unconstitutional does not prohibit or invalidate regulations having to do with the posting of the optometrists' names present, or the requirement that those optometrists whose names are posted work so many hours per week at their place of business.

to particular dispensing opticians. The Court does not find this article violative of Plaintiffs' constitutional rights.

Initially, the Court notes that first and fourteenth amendment rights are not absolute. As the Supreme Court observed in *Konigsberg v. State Bar of California*, 366 U.S. 36, 50-51, 81 S.Ct. 997, 1007, 6 L.Ed.2d 105 (1961),

> . . . general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, . . .

Evidence of a history of "kickbacks," economic tie-ins, and economic coercion peculiar to the optometric field provides a rational basis for a legitimate legislative purpose in enacting this article. See *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Further, by its wording, the clear purpose of this article appears to be to prevent the patient from being led to believe that the lens prescription must be taken to a particular optician, but instead requires that he be told that the optometrists can prepare or have the lenses prepared, *OR* that the patient may have the prescription filled by any optician he chooses. Therefore, the rationale of the recent Supreme Court cases involving advertising and first amendment rights is not applicable, since the effect of the article in question is not to restrict, but to

encourage the free flow of commercial information to consumers. *See Bates v. State Bar of Arizona, supra, and Virginia Pharmacy Board v. Virginia Consumer Council, supra.*

[5] Plaintiffs' equal protection allegations are also unpersuasive. As one three judge court observed in *Wall v. American Optometric Association, Inc.* D.C., 379 F.Supp. 175, 191 (1974), aff'd 419 U.S. 888, 95 S.Ct. 166, 42 L.Ed.2d 134 (1974), in rejecting an equal protection argument against distinguishing between ophthalmologists and optometrists,

> The equal protection clause of the Fourteenth Amendment does not require the state to treat different groups in the same manner. Only unreasonable discriminations are forbidden. *Williamson v. Lee Optical* [348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955)].

[6] Finally, the Court turns its attention to Vernon's Ann.Civ.Stat. art. 4552-2.02, which provides in pertinent part that "[a]t all times there shall be a minimum of two-thirds of the [Texas Optometry] board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association." Plaintiffs assert that the resulting "4-2" Board composition is a violation of their rights to equal protection and due process.[4] More specifically, Plaintiffs allege there is no

4. The intervening senior citizens also contend that the Board composition leads to statutory interpretations restricting advertising and other methods of communicating commercial information, thereby resulting in an abridgment of their first amendment rights. Whatever merit the senior citizens' claim may have had, the Court feels the argument is mooted by the Court's adherence, elsewhere in this decision, to *Bates v. State Bar of Arizona, supra.*

rational basis for the differentiation between Texas Optometric Association [TOA] and non-TOA optometrists which would justify the distinction made between them for Board membership. Therefore, Plaintiffs assert non-TOA members, though equally qualified, are denied equal access to the governing Board, and are thereby deprived of an equal opportunity to exercise political influence. Plaintiffs also contend that the board composition requirements are unconstitutional because they create an irrebuttable presumption that TOA members are two-thirds more likely to be qualified than non-TOA members. In addition, Plaintiffs allege that the composition of the board deprives them of procedural due process, since eventually non-TOA members could be brought or charged before a biased (in favor of TOA members) Board.

On the other hand, Defendants assert that the allegedly unique problems the optometry profession has had in the areas of quality of care, "kickbacks" and tie-ins, and economic control over many members of the profession, provide a rational basis for state regulation. More particularly, Defendants allege the following rational bases for the requisite board composition:

(1) TOA members are more likely to be economically independent than non-TOA members;

(2) TOA members have a greater likelihood of emphasizing the highest quality of eye care, as compared to non-TOA members; and,

(3) TOA members are more prone to enforce the Texas Optometry Act than non-TOA members.

In addressing Plaintiffs' equal protection arguments, the Court must bear in mind the deference which the judiciary gives to the legislative branch in the area of economic regulation. As the Supreme Court observed in a recent decision, *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516-2517, 49 L.Ed.2d 511 (1976),

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, *e. g. Lehnhausen v. Lake Shore Auto Parts Co.* [410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973)]. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

The Supreme Court has previously held that "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it . . .", *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961), and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden v. Kentucky*, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590 (1940).

The Court rejects Plaintiffs' attempt to analogize the instant case with *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974), since (1) there the Court

was deadling with an inherently suspect classification (racial imbalance was involved), and (2) the basis of Plaintiffs' argument is found in a possible implication contained in dicta in the Supreme Court opinion.

Nor does the Court feel, in the face of Defendants' asserted rational bases, that Plaintiffs have carried the heavy burden required of them to prevail on equal protection grounds against state regulation.

The Court is also unconvinced by Plaintiffs' substantive due process arguments. Plaintiffs' reliance on three Supreme Court cases, *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973), *United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767 (1973), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), as a basis for their allegation as to the unconstitutionality of their alleged irrebuttable presumption is ill founded. As contrasted with this case, all three of the cited cases involved fundamental rights, to which the irrebuttable presumption analysis has been limited. In the instant case, the Court must follow the reasoning of those non-fundamental rights cases involving sovereign state regulation of economic matters. See, *e. g. New Orleans v. Dukes, supra; Williamson v. Lee Optical of Oklahoma, Inc., supra.* A further consideration in the Court's rejection of Plaintiffs' position is that this article does not conclusively deny any person a Board seat.

The Court also is unpersuaded by Plaintiffs' procedural due process arguments. As one Court has noted, "there is no federal constitutional requirement to the effect that legislators and rule makers must be free of bias or interest. . . ." *Wall v. American Optometric Association,*

Inc., supra. Wall and *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1972) are both readily distinguishable from the instant case for several reasons: (1) those cases were brought *after* the optometry boards in question had brought charges against the optometrist plaintiffs, therefore they speak directly only to the due process issues which surround disciplinary adjudications; (2) in those cases the board had rulemaking power, which they had exercised, while in the instant case the Texas Board has no rule-making power, but only power to enforce what the legislature has mandated; and (3) *all* members of those boards were members of the State Optometrical Association, while here one-third of the Board is composed of non-TOA members.

[7, 8] In deciding in the face of the instant challenge that Vernon's Ann.Civ.Stat. art. 4552-2.02 is not violative of the Constitution, the Court does not address the potential constitutional problems if, in the future, non-TOA members should be charged and brought for a hearing before the Board as presently composed. The Court feels compelled to point out, however, that it is clear "that those with substantial pecuniary interest in legal proceedings should not adjudicate [such] disputes." *Gibson v. Berryhill, supra.* Further, the Court points out that " '[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.' K. Davis, Administrative Law Text § 12.04, p. 250 (1972), and cases cited." *Id.* In addition, the Court would note that a constitutionally fatal bias in the statutory composition of a tribunal is not necessarily remedied by an offer of that tribunal to abdicate its statutory function. See *Wall v. American Optometric Association, Inc., supra.*

We have examined carefully all of Plaintiffs' other allegations and find each of them to be without merit.

Any finding of fact heretofore made which constitutes a conclusion of law is hereby adopted as a conclusion of law and any conclusion of law which is a finding of fact is hereby adopted as a finding of fact.

Counsel are directed to prepare an order in accordance with this Opinion.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-75-277-CA

DR. N. JAY ROGERS
Plaintiff;

W. J. DICKINSON, Individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter,
Intervenor;

v.

DR. E. RICHARD FRIEDMAN, DR. JOHN B. BOWEN, DR. HUGH A. STICKSEL, JR., DR. JOHN W. DAVIS, DR. SAL MORA,
Defendants;

TEXAS OPTOMETRIC ASSOCIATION, INC.,
Intervenor.

FINAL JUDGMENT

In accordance with the memorandum opinion of the Court dated September 12, 1977, in the above styled and numbered cause, it is the Order, Judgment, and Declaration of the Court that:

1. Section 5.09(a) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared

unconstitutional under the First Amendment of the United States Constitution insofar as it prohibits optometrists from making "any statement or advertisement of price of optometric services or materials." The members of the Texas Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same.

2. Section 5.13(d) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared unconstitutional under the First Amendment of the United States Constitution insofar as it provides that "[n]o optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name or any name other than the name under which he is licensed to practice optometry in Texas." Members of the Texas Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same, or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name.

3. Section 5.15(e) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared constitutional insofar as it requires a mandatory colloquy between the optometrist and his patient regarding referral to a dispensing optician; and such is not in violation of the First or Fourteenth Amendments of the United States Constitution.

4. Section 2.02 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas is declared constitutional insofar as it requires two-thirds of the Optometry Board members to be members of a state optometric

association which is recognized by and affiliated with the American Optometric Association; and such provision is not in violation of the First and Fourteenth Amendments of the United States Constitution.

5. Defendant's Motion to Dismiss for Improper Venue, as contained in Defendants' Amended Answer, is hereby overruled.

6. All other relief not herein specifically granted is denied.

7. The Court's finding of fact and conclusions of the law as set forth in the Court's memorandum opinion dated September 12, 1977, are hereby incorporated herein.

8. This judgment shall be considered for purposes of appeal and otherwise, as a final judgment in this case.

9. All parties shall pay costs as heretofore incurred and expended by them, respectively.

10. Judgment is not stayed pending the appeal hereof, with the caveat to all parties acting in reliance upon the Court's findings of constitutionality and unconstitutionality that the Court's rulings are subject to final adjudication upon appeal.

SIGNED this 27th day of October, 1977.

/s/ IRVING L. GOLDBERG
United States Circuit Judge

/s/ JOE J. FISHER
United States District Judge

/s/ WILLIAM M. STEGER
United States District Judge

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-75-277-CA

DR. N. JAY ROGERS
Plaintiff;

W. J. DICKINSON, Individually and as President of the Texas Senior Citizens Association,
Port Arthur, Texas Chapter,
Intervenor;

v.

DR. E. RICHARD FRIEDMAN, DR. JOHN B. BOWEN, DR. HUGH A. STICKSEL, JR., DR. JOHN W. DAVIS, DR. SAL MORA,
Defendants;

TEXAS OPTOMETRIC ASSOCIATION, INC.,
Intervenor.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Dr. N. Jay Rogers, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the portion of the Final

Judgment entered in this action on October 27, 1977 that upholds the constitutionality of Sections 5.15(e) and 2.02 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas, and denying the prayer for injunction prohibiting enforcement of said statutes.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN
Attorneys for Plaintiff

By /s/ ROBERT Q. KEITH
Of Counsel

1400 San Jacinto Building
Beaumont, Texas 77701

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-75-277-CA

DR. N. JAY ROGERS
Plaintiff;

W. J. DICKINSON, Individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter,
Intervenor;

v.

DR. E. RICHARD FRIEDMAN, DR. JOHN B. BOWEN, DR. HUGH A. STICKSEL, JR., DR. JOHN W. DAVIS, DR. SAL MORA,
Defendants;

TEXAS OPTOMETRIC ASSOCIATION, INC.,
Intervenor.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that W. J. Dickinson, Individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, the Intervenor above named, hereby appeal to the Supreme Court of the United States from the portion of the Final Judgment entered

in this action on October 27, 1977 that upholds the constitutionality of Sections 5.15(e) and 2.02 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas, and denying the prayer for injunction prohibiting enforcement of said statutes.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN
Attorneys for Intervenor

By /s/ ROBERT Q. KEITH
Of Counsel

1400 San Jacinto Building
Beaumont, Texas 77701

APPENDIX C

Art. 4552-2.02. Qualifications of members

To be qualified for appointment as a member of the board, a person must be a licensed optometrist who has been a resident of this state actually engaged in the practice of optometry in this state for the period of five years immediately preceding his appointment. A person is disqualified from appointment to the board if he is a member of the faculty of any college of optometry, if he is an agent of any wholesale optical company, or if he has a financial interest in any such college or company. At all times there shall be a minimum of two-thirds of the board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 2.02, eff. Sept. 1, 1969.

Art. 4552-2.09. Suit for injunction

The board may sue in its own name to enjoin the violation of any provision of this Act. This remedy is in addition to any other action, proceeding, or remedy authorized by law.

Acts 1969, 61st Leg., p 1298, ch. 401, § 2.09, eff. Sept. 1, 1969.

Art. 4552-2.10. Proceedings; subpoenas; oaths

The board, any committee or any member thereof, shall have the power to issue subpoenas and subpoenas

duces tecum to compel the attendance of witnesses and the production of books, records and documents, to administer oaths and to take testimony concerning all matters within its or his jurisdiction. The board shall not be bound by strict rules of procedure or by the laws of evidence in the conduct of its proceedings but the determination shall be founded upon sufficient legal evidence to sustain it.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 2.10, eff. Sept. 1, 1969.

Art. 4552-2.14. Rules and regulations

The board shall promulgate procedural rules and regulations only, consistent with the provisions of this Act, to govern the conduct of its business and proceedings. Notwithstanding any other provision of this Act, the board shall not have any power or authority to amend or enlarge upon any provision of this Act by rule or regulation or by rule or regulation to change the meaning in any manner whatsoever of any provision of this Act or to promulgate any rule or regulation which is in any way contrary to the underlying and fundamental purposes of this Act or to make any rule or regulation which is unreasonable, arbitrary, capricious, illegal, or unnecessary.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 2.14, eff. Sept. 1, 1969.

Art. 4552-3.01. Must pass examination

Every person hereafter desiring to be licensed to prac-

tice optometry in this state shall be required to pass the examination given by the Texas Optometry Board.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 3.01, eff. Sept. 1, 1969.

Art. 4552-3.06. Conduct of examination

All examinations shall be conducted in writing and by such other means as the board shall determine adequate to ascertain the qualifications of applicants and in such manner as shall be entirely fair and impartial to all individuals and every recognized school of optometry. All applicants examined at the same time shall be given the same written examination.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 3.06, eff. Sept. 1, 1969.

Art. 4552-3.07. Those passing entitled to license

Every candidate successfully passing the examination and meeting all requirements of the board shall be registered by the board as possessing the qualifications required by this law and shall receive from this board a license to practice optometry in the state.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 3.07, eff. Sept. 1, 1969.

Art. 4552-4.04. Revocation, suspension, etc.

(a) The board may, in its discretion, refuse to issue a license to any applicant and may cancel, revoke or suspend the operation of any license if it finds that:

(1) the applicant or licensee is guilty of gross immorality;

(2) the applicant or licensee is guilty of any fraud, deceit, dishonesty, or misrepresentation in the practice of optometry or in his seeking admission to such practice;

(3) the applicant or licensee is unfit or incompetent by reason of negligence;

(4) the applicant or licensee has been convicted of a felony or a misdemeanor which involves moral turpitude;

(5) the applicant or licensee is an habitual drunkard or is addicted to the use of morphine, cocaine or other drugs having similar effect or has become insane or has been adjudged by a court of competent jurisdiction to be of unsound mind;

(6) the licensee has directly or indirectly employed, hired, procured, or induced a person, not licensed to practice optometry in this state, to so practice;

(7) the licensee directly or indirectly aids or abets in the practice of optometry any person not duly licensed to practice under this Act;

(8) the licensee directly or indirectly employs solicitors, canvassers or agents for the purpose of obtaining patronage;

(9) the licensee lends, leases, rents or in any other manner places his license at the disposal or in the service of any person not licensed to practice optometry in this state;

(10) the applicant or licensee has willfully or repeatedly violated any of the provisions of this Act;

(11) the licensee has willfully or repeatedly represented to the public or any member thereof that he is authorized or competent to cure or treat diseases of the eye;

(12) the licensee has his right to practice optometry suspended or revoked by any federal agency for a cause which in the opinion of the board warrants such action;

(13) the applicant or licensee has been finally convicted of violation of Article 773 of the Penal Code.[1]

(b) Proceedings under this section shall be begun by filing charges with the board in writing and under oath. Said charges may be made by any person or persons. The chairman of the board shall fix a time and place for a hearing and shall cause a copy of the charges, together with a notice of the time and place fixed for the hearing, to be served on the respondent or his counsel at least 10 days prior thereto. When personal service cannot be effected, the board shall cause to be published once a week for two successive weeks a notice of the hearing in a newspaper published in the county wherein the respondent was last known to practice, and shall mail a copy of the charges and of such notice to the respondent at his last known address. When publication of the notice is necessary, the date of hearing shall not be less than 10 days after the last date of the publication of the notice.

(c) At said hearing the respondent shall have the right to appear either personally or by counsel, or both, to produce witnesses and evidence on his behalf, to cross examine witnesses and to have subpoenas issued by the

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1. See, now, art. 4505a.

board. The board shall thereupon determine the charges upon their merits.

(d) Any person whose license to practice optometry has been refused or has been revoked or suspended by the board may, within 20 days after the making and entering of such order, take an appeal to any of the district courts of the county of his residence, but the decision of the board shall not be stayed or enjoined except upon application to such district court after notice to the board.

(e) Upon application, the board may reissue a license to practice optometry to a person whose license has been revoked but such application shall not be made prior to one year after the revocation and shall be made in such manner and form as the board may require.

(f) Nothing in this Act shall be construed to prevent the administrator or executor of the estate of a deceased optometrist from employing a licensed optometrist to carry on the practice of such deceased during the administration of such estate nor to prevent a licensed optometrist from working for such person during the administration of the estate when the legal representative thereof has been authorized by the county judge to continue the operation of such practice.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 4.04, eff. Sept. 1, 1969.

Supreme Court, U. S.
FILED
MAR 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-1164

* * *

DR. N. JAY ROGERS, O. D., et al,
Appellants

V.

DR. E. RICHARD FRIEDMAN, O. D., et al,
Appellees

* * *

ON APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

* * *

MOTION TO AFFIRM

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-1164

* * *

DR. N. JAY ROGERS, O. D., et al.,

Appellants

V.

DR. E. RICHARD FRIEDMAN, et al.,

Appellees

* * *

MOTION TO AFFIRM

* * *

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the limited portion of the final judgment and decree of the District Court which upholds the constitutionality of Section 2.02 of the Texas Optometry Act, article 4552, Revised Civil Statutes of Texas, be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

In a companion case to the case at bar, Appellee members of the Texas Optometry Board have filed a Jurisdictional Statement which sets out the history and background of this lawsuit. *See Friedman v. Rogers*, No. 77-1163. Since the procedural history of this case is already before the Court, Appellees will confine themselves to a direct response to Appellants' Statement of the Case in this Statement.

Appellants contend that the evidence produced at trial refutes all of the proferred rational bases for Section 2.02 of the Texas Optometry Act. The lower court, however, in noting that the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, found that Plaintiffs had not carried the heavy burden required of them to prevail on equal protection grounds in the face of Defendants' asserted rational bases. The Court also held that Plaintiffs' substantive and procedural due process arguments were without merit.

The state went beyond what is required of it and presented evidence to support its alleged rational bases for Section 2.02. For example, Appellees presented a variety of evidence in support of their contention that Texas Optometric Association (TOA) members are more likely to be economically independent than non-TOA members and thus less likely to be affected by any conflict of interest. Contract agreements for partnerships and for the purchase of Texas State Optical (TSO) offices entered into between Appellant Board member and other optometrists were admitted at trial and establish a close connection between the buyer and the seller as well as the seller's optical supply company. The buyer, a licensed optometrist, was required to follow the seller's (Rogers Bros.) rules, regulations, and policies for office management. The state could rationally expect that such contractual arrangements, with the resultant dependence of the buyer optometrist upon the seller optical company, could affect the impartiality of such a buyer as a potential Board member.

Appellees further introduced contracts between optical companies and practicing optometrists which guaranteed the optometrist a salary but gave both parties the power to terminate with only ten days notice.

Clearly, the optical company could utilize such a contractual right to bring pressure on the optometrist were that optometrist a Board member. Appellees even presented testimony by an optometrist who was a part owner in a large optical company at one time, but who has since entered into private practice with one associate, that if an optometrist employed by him when he was part owner of Lee Optical were a member of the Board and voted against the best interest of Lee Optical, that optometrist would either have been fired or forced to terminate because of unpleasant conditions. Since commercial optometrists are not admitted to TOA and thus TOA members tend to be financially independent, the state can reasonably expect that TOA members will not be as likely to be subject to the possibility of economic influence.

Appellants place great weight on the testimony of board member Dr. Hugh Sticksel, Jr., and his inability to distinguish between control over a Board member employed by a TOA member and one employed by Texas State Optical. The distinction lies in the interest of those who could exert such control over a Board member. It is clear that the chain optical companies would have much to gain from any influence upon a Board member. Dr. Rogers acknowledges that many provisions of the Texas Optometry Act are to his economic detriment. Clearly, the less vigorous the enforcement of these provisions, the less economic loss the chain optical companies suffer. Dr. Rogers based this lawsuit on the premise that he would secure more business for TSO if commercial restrictions were removed from the practice of optometry in Texas. A TOA member simply does not have such an inevitable, direct economic interest in these matters. The State has created a Board which will not be controlled by those with such conflicts of interest, but has not precluded their representation on the Board.

While Appellees submit that the State, without more, could rationally require a TOA majority due to TOA members' economic independence and lack of direct economic interest in the operation of the statutory provisions, the present composition is also a result of incidents taking place shortly before the adoption of the Act which might indicate to the Legislature that TOA members are more prone to enforce the Optometry Act than non-TOA members. In 1967, two optometrists employed by Lee Optical, Dr. Geller and Dr. Shropshire, were nominated to the Board. Since there were only five members of the Board, one of whom was Dr. Rogers, these nominations gave the "commercialists" control of the Board. Dr. Rogers was elected president of the Board at a meeting held without a quorum. Within months, Dr. Rogers had initiated a mail ballot which contained a vote concerning the repeal of the Professional Responsibility Rule, which was adopted in 1959 pursuant to an Attorney General's Opinion and a 542 to 31 vote in its favor in a poll of all Texas Optometrists. Drs. Rogers, Geller, and Shropshire voted to repeal this Rule and a dispute arose as to whether the rule had been legally repealed. The Board's attorneys, including the Honorable Thomas Gee, was of the opinion that the rule had not been legally repealed. In 1969, however, the Legislature codified the Rule, rejected the nominations of Drs. Geller and Shropshire to the Board, and required that a majority of the Board be members of TOA. Where regulations operate to the detriment of, and are opposed by, a group of persons, the State must be allowed to prevent those persons from controlling the enforcement of the regulations.

Appellants assert that since all optometrists agree on the proper examination of patients, the assertion that TOA members are more likely to emphasize the highest

quality of eye care is without basis. What appellants ignore is the impact of commercial methods upon the likelihood that a patient will receive the care that all acknowledge he should. The Legislature has decided that practices leading to a high volume optometric practice would tend to result in poor quality eyecare. The fact that Dr. Friedman would expect and hope that the same patient care would be given by a TOA member and a "commercialist" does not indicate that the same would hold true in the absence of vigorously enforced commercial restrictions. Appellants have failed in their burden to show the lack of this rational basis.

Appellants have totally failed in their burden to negate the asserted rational bases for Section 2.02 of the Texas Optometry Act. Furthermore, the evidence produced at trial established that the rational bases for the statute are supported by the facts.

ARGUMENT AND AUTHORITIES

The decision of the District Court is plainly correct. The requirements of section 2.02 of article 4552, the Texas Optometry Act, are clearly justified as a proper exercise of the State's power to determine the composition of its administrative branches as well as its authority to regulate economic matters. Fifteen states either require board members to be members of state optometric associations which are affiliated with the American Optometric Association or require the governor to select board members from a list of nominees prepared by such associations. Such statutes have been upheld when challenged, *McCrory v. Wood*, 171 So.2d 241 (Ala. 1965); *Marks v. Franks*, 298 P.2d 216 (Kan. 1956), since "the question of public policy involved in the composition of administrative agencies is for the legislature to debate and decide . . .." *Kachian v. Optometrists Examiners Board*, 170 N.W.2d 743, 748 (Wis. 1969).

Other cases upholding statutes which require board members to be members of a particular private organization or which delegate the power of appointment to such organizations are: *Seidenberg v. New Mexico Board of Medical Examiners*, 452 P.2d 469 (N.M. 1969); *Lanza v. Wagner*, 183 N.E. 2d 670 (N.Y. 1962), *cert. denied*, 371 U.S. 901; *Ashmore v. Greater Greenville Sewer District*, 44 S.E. 2d 88 (S.C. 1947); *In re Opinion of the Justices*, 42 So.2d 56 (Ala. 1942); *Bradley v. Board of Zoning Adjustment of City of Boston*, 150 N.E. 892 (Mass. 1926); *In re Campbell*, 47 A. 860 (Pa. 1901); *Cohen v. State*, 275 N.Y.S. 2d 719 (N.Y. Sup. 1966). *See also*, 63 Am. Jur. 2d *Public Officers and Employees* §94 (1972); 16A C.J.S. *Constitutional Law* §460 (1956).

Furthermore, as recognized by the lower court, section 2.02 constitutes an exercise of the state's power in the area of economic regulation. Consequently, "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it . . .," *McGowan v. Maryland*, 366 U.S. 420, 426 (1961), and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

The lower court noted three justifications for the requirement of a TOA majority.

> (1) TOA members are more likely to be economically independent than non TOA-members;
>
> (2) TOA members have a greater likelihood of emphasizing the highest quality of eye care, as compared to non-TOA members; and,

(3) TOA members are more prone to enforce the Texas Optometry Act than non-TOA members.

These rationales were not merely alleged; rather, the State went far beyond that which is required and offered uncontroverted evidence in support thereof. The attempts by non-TOA members, including Appellant Board member herein, to frustrate the proper enforcement of valid regulations were clearly documented. The State's proof illustrated the economic interest of many non-TOA members in avoiding regulations. The evidence showed more than the requisite rational basis; the necessity for section 2.02 was forcefully presented.

In somewhat of a hodgepodge of legal theories, Appellants assert that section 2.02 abridges freedom of association, equal protection, and procedural and substantive due process. Section 2.02 is also claimed to create a "chilling effect" on advertising.

This Court has found a violation of the right of association only when the record has shown an unjustifiable and "significant interference with the freedom of association." *Bates v. City of Little Rock*, 361 U.S. 516,523 (1960); *NAACP V. Alabama*, 357 U.S. 449, 462 (1958). Such interference has been found in these associational privacy cases, in an absolute exclusion of members of an association from professional licensing, and in prohibitions of association. *Baird v. Arizona*, 401 U.S. 1 (1971), *Mine Workers v. Illinois Bar Association*, 389 U.S. 217 (1967). In the case at bar there is no significant intrusion upon this freedom. There is no evidence in the record which indicates that any person has been or will be deterred from exercising his freedom of association. This Court has never found a violation of a person's freedom of association in legislation which does

not penalize membership in any organization but which, at most, may provide some advantage to membership in a particular association. Section 2.02 does not restrict the right of any person to become a member of any association or penalize the exercise thereof. Accordingly, there is no intrusion, significant or otherwise, of any person's rights of association.

Appellants' equal protection claim was rejected by the lower court in reliance upon *New Orleans v. Dukes, supra*, in which this Court stated:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discrimination. See, *e.g., Lehnhausen v. Lake Shore Auto-Parts Co.*, 410 U.S. 356 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

Id. at 303. The State's proven rationales clearly satisfy this standard. *See also, Matthews v. Lucas*, 427 U.S. 495 (1976); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Williamson v. Lee Optical, supra; McCrory v. Wood, supra.*

The lower court dealt with Appellants' irrebuttable presumption argument as follows:

> Plaintiffs' reliance on three Supreme Court cases, *Vlandis v. Kline*, 412 U.S. 441 (1973);

> *United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973), and *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974), as a basis for their allegation as to the unconstitutionality of their alleged irrebuttable presumption is ill founded. As contrasted with this case, all three of the cited cases involved fundamental rights, to which the irrebuttable presumption analysis has been limited. In the instant case, the Court must follow the reasoning of those non-fundamental rights cases involving sovereign state regulation of economic matters. See, *e.g. New Orleans v. Dukes, supra; Williamson v. Lee Optical of Oklahoma, Inc., supra.* A further consideration in the Court's rejection of Plaintiffs' position is that this article does not conclusively deny any person a Board seat.

The lower court was clearly correct; Appellants' view amounts to a restructuring of the equal protection standards which have long been observed by this Court, since any classification creates the type of irrebuttable presumption challenged here. *See Rubins v. Ghezzi*, 512 F.2d 431 (2nd Cir. 1975).

Appellants' procedural due process claim is also clearly without merit. As stated by the lower court, *Gibson v. Berryhill*, 411 U.S. 564 (1972) and *Wall v. American Optometric Association, Inc.*, 379 F. Supp. 175 (N.D. Ga. 1974), *aff'd*, 419 U.S. 888 (1974),

> are both readily distinguishable from the instant case for several reasons: (1) those cases were brought *after* the optometry boards in question had brought charges against the optometrist plaintiffs, therefore they speak directly only to the due process issues which

> surround disciplinary adjudications; (2) in those cases the board had rule-making power, which they had exercised, while in the instant case the Texas Board has no rule-making power, bu only power to enforce what the legislature has mandated; and (3) all members of those boards were members of the State Optometrical Association, while here one-third of the Board is composed of non-TOA members.

Furthermore, in *Gibson* and *Wall* the Court was concerned with an effort "to revoke the licenses of all optometrists . . . employed by business corporations such as Lee . . .." *Gibson v. Berryhill, supra* at 578; *Wall v. American Optometric Association, Inc., supra* at 188-189. Since the Texas Optometry Board has revoked only one license since the enactment of section 2.02 in 1969, and that revocation was not even appealed by the optometrist involved, it is clear that there is no such wholesale discrimination and no direct pecuniary benefit to be gained by any TOA board member from official action. *See Texas State Board of Optometry v. Lee Vision Center, Inc.*, 515 S.W.2d 380 (Tex. Civ. App.-Eastland, 1974, writ ref'd n.r.e.) By comparison, it may be noted that commercial optometrists would realize such a direct benefit from the failure to enforce statutory provisions which restrict commercial practices.

The only example offered by Appellants of the Board's "bias" is the Adoption of Interpretation No. 6 which concerned advertising. The Board's Interpreation was upheld as the correct construction of the law by both the Attorney General and the courts of Texas. Attorney General Opinion M-1029 (1971); *Texas State Board of Optometry v. Lee Vision Center, Inc., supra.* Far from showing bias on the part of TOA Board members, the 4-2 vote of the Optometry Board in this matter illustrates

the necessity of a TOA majority to insure enforcement of state law.

Appellants' speculative assertion that the Board will act against optometrists who advertise is closely connected to the "chilling effect" they claim is created by the TOA majority. There is no evidence in the record to support either of these speculations and the history of the Board's practice refutes both. The Board has commendably restricted itself to enforcement of statutory requirements and, as noted above, has revoked only one license since the enactment of article 4552. This exemplary record has been developed notwithstanding the fact that several commercial practices opposed by the TOA are permissible under article 4552. The Board members invariably testified that how an optometrist practices is not their concern as long as he obeys the law. The record of the Board illustrates the unassailable truth of this testimony. There is *no* reason to expect otherwise with respect to price advertising and Appellants have failed to establish sufficient facts to support their claim. Their speculations are conclusively controverted by the evidence.

Accordingly, the lower court correctly upheld section 2.02 and Appellants have failed to present any substantial questions which would merit plenary consideration by this Court. Appellees respectfully pray that the Court grant this motion to affirm on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dorothy Prengler, a member of the Bar of the Supreme Court of the United States, have entered my appearance in the above referenced cause on behalf of the Appellee Board members in their official capacity. I do hereby certify that three copies of the foregoing Motion to Affirm have been served on all parties required to be served by placing same in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to all counsel of record: Robert Q. Keith, 1400 San Jacinto Bldg., Beaumont, Texas 77701, Larry Niemann, 1210 American Bank Tower, Austin, Texas 78701, Brian R. Davis, 408 First Federal Plaza, 200 E. 10th St., and John Tucker, Beaumont Savings Bldg., Beaumont, Texas 77701 on this the ___ day of March, 1978.

DOROTHY PRENGLER

Supreme Court, U. S.
FILED
MAR 22 1978
MICHAEL RODAK, JR., CLERK

NO. 77-1164

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

DR. N. JAY ROGERS, O.D. and W. J. DICKINSON,
Individually and as President of the TEXAS
SENIOR CITIZENS ASSOCIATION, PORT ARTHUR,
TEXAS CHAPTER,

Appellants

V.

DR. E. RICHARD FRIEDMAN, O.D., DR. JOHN B.
BOWEN, O.D., DR. HUGH A. STICKSEL, JR., O.D.
DR. JOHN W. DAVIS, O.D., DR. SAL MORA, O.D.,
Individually and in their official capacity as members of
THE TEXAS OPTOMETRIC BOARD; and
THE TEXAS OPTOMETRIC ASSOCIATION, INC.,

Appellees

ON APPEAL FROM A THREE-JUDGE COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

MOTION TO AFFIRM OR DISMISS
FILED BY APPELLEE
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March 20, 1978

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ON APPEAL FROM A THREE-JUDGE COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

MOTION TO AFFIRM OR DISMISS
FILED BY APPELLEE
TEXAS OPTOMETRIC ASSOCIATION, INC.

Motion to Dismiss or Affirm

Appellee, Texas Optometric Association, Inc., moves to dismiss this appeal or affirm the lower court's judg-

ment with respect to this appeal for the reason that the questions presented are so insubstantial as not to need further argument.

Opinion Below

The opinion of the United States Three-Judge District Court for the Eastern District of Texas is reported at 438 F. Supp. 428. The opinion and judgment are reproduced in appellants' Jurisdictional Statement.

Jurisdiction

The jurisdictional requisites are adequately set out in Appellants' Jurisdictional Statement.

Questions Presented

I. Whether the Three-Judge Federal Court erred in determining that §2.02 of the Texas Optometry Act has a rational basis and does not deprive Appellant Rogers of equal protection of the laws.

II. Whether the Three-Judge Federal Court erred in determining that §2.02 does not deprive Appellant Rogers of due process of law.

III. Whether the Three-Judge Federal Court erred in determining that §2.02 does not infringe upon Ap-

pellant Texas Senior Citizen Association's First Amendment rights to receive commercial information.

Statute Involved

The court below declared that §2.02 of the Texas Optometry Act, Article 4552 of the Revised Civil Statutes of Texas, was constitutional. The statute reads as follows:

> Article 4552, §2.02. To be qualified for appointment as a member of the [Texas Optometry] board, a person must be a licensed optometrist who has been a resident of this state actually engaged in the practice of optometry in this state for the period of five years immediately preceding his appointment. A person is disqualified from appointment to the board if he is a member of the faculty of any college of optometry, if he is an agent of any wholesale optical company, or if he has a financial interest in any such college or company. At all times there shall be a minimum of two-thirds of the board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association.

Statement of the Case

On August 25, 1975, Appellant, Dr. Rogers, who is a member of the Texas Optometry Board, brought this case against the remaining five members of the Texas Optometry Board. In his suit, Dr. Rogers challenged

§2.02 and various other sections of the Texas Optometry Act as being unconstitutional and sought to enjoin their enforcement. Section 2.02, which is the statute at issue in this appeal, was challenged as being an arbitrary classification in violation of Dr. Rogers' Fourteenth Amendment rights to equal protection and due process. A three-judge court was convened to consider this case.

On June 11, 1976, W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter intervened and asserted that §2.02 violated Senior Citizens' First Amendment rights. Mr. Dickinson and his association will hereinafter be referred to as "Senior Citizens".

On September 13, 1976, the Texas Optometric Association, Inc., intervened in support of the Texas Optometry Board members and in support of the constitutionality of §2.02.

On October 27, 1977, the three-judge court entered its final judgment holding that §2.02 does not violate the First or the Fourteenth Amendments of the United States Constitution and denied injunctive relief. From this holding Dr. Rogers and Senior Citizens have appealed.

Summary of Argument

Equal protection. The three-judge court below was correct in holding that Section 2.02 does not violate Dr. Rogers' constitutional right to equal protection. The court properly applied the rational basis test which dic-

tates that where the legislature could have had a rational basis for creating a classification in matters of economic regulation, the courts will defer to the legislative determination and allow the statute to stand. The lower court concluded that there were several different rational reasons for the statutory requirement of §2.02 which requires that four of the six members of the Texas Optometry Board belong to the Texas Optometric Association (TOA). Those rational bases were as follows:

(1) There is ample evidence to indicate that TOA members are more likely than non-TOA members to be economically independent;

(2) There is ample evidence to indicate that TOA members are more likely than non-TOA members to emphasize the highest quality of eye care; and

(3) There is ample evidence to indicate that TOA members are more likely than non-TOA members to enforce the Texas optometry law.

It is only necessary to show that the legislature *might* have had these reasons for enacting §2.02; but in this case, the rational reasons are even stronger because there is evidence that the legislature was *actually aware* of these rational bases for §2.02.

Having determined that §2.02 did have a rational basis, the lower court correctly determined that §2.02 was not unconstitutional on equal protection grounds.

Freedom of speech. In Dr. Rogers' Jurisdictional Statement to this Court, he asserts for the first time that

§2.02 is an unconstitutional violation of his first amendment rights to freedom of speech and association. However, Dr. Rogers, who is himself a member of the Texas Optometry Board, has not shown that his free speech or associational rights have been significantly impaired by §2.02. His assertion that TOA members on the Board might harass advertising optometrists and might thereby have a chilling effect on his right to advertise, is highly speculative and not substantial enough to warrant this Court's consideration.

Substantive due process. The court below was correct in determining that §2.02 does not violate Dr. Rogers' right to substantive due process. The court properly determined that the rational basis analysis (rather than an irrebuttable presumption analysis) governs the constitutionality of §2.02 on substantive due process grounds. Since §2.02 was found to have a rational basis, the court correctly held that §2.02 does not violate substantive due process. Furthermore, the court determined that even if an irrebuttable presumption analysis were applied, §2.02 does not conclusively and irrebuttably deny a board seat to anyone, much less Dr. Rogers who is on the Texas Optometry Board.

Procedural due process. The court below correctly overruled Dr. Rogers' procedural due process contention that TOA members are inherently biased and that §2.02 is therefore unconstitutional on procedural due process grounds. Dr. Rogers is incorrect in asserting that every optometrist who belongs to TOA must be presumed biased and that §2.02 therefore creates an inherently biased board. Bias cannot be constructively

presumed. Instead, it must be actually proven on a case-by-case basis. Since this lawsuit did not arise out of an adjudicatory proceeding, it therefore does not deal with questions of actual bias. It deals only with the possibility of bias in some future case where the parties are yet unknown. The three-judge court below correctly concluded that §2.02 should not be struck down merely because there *might* be bias in some future case. Section 2.02 does not violate Dr. Rogers' procedural due process rights.

Mootness of Senior Citizens' challenge. Appellant Senior Citizens asserts that §2.02 violates its first amendment right to receive price information through advertising. The court below properly concluded that since the Texas law prohibiting price advertising by optometrists has been declared unconstitutional and since the Optometry Board has been enjoined from enforcing it, Senior Citizens' challenge on §2.02 is mooted.

Arguments and Authorities

I. THE THREE-JUDGE FEDERAL COURT CORRECTLY HELD THAT §2.02 OF THE TEXAS OPTOMETRY ACT HAS A RATIONAL BASIS AND THEREFORE DOES NOT DEPRIVE APPELLANT ROGERS OF EQUAL PROTECTION OF THE LAWS.

A. *Basis of challenge by Dr. Rogers.* In the court below, Dr. Rogers challenged the constitutionality of §2.02, alleging that it created an arbitrary classification of optometrists and thereby deprived him of equal pro-

tection under the law.

B. *Findings in the court below.* The three-judge court which heard this matter correctly determined that §2.02 was founded on a rational basis and therefore does not violate the equal protection clause. Citing *New Orleans v. Dukes* 427 U.S. 297 (1976), the court noted that when local economic regulation is challenged as violating the equal protection clause, the court shall defer to legislative determination. The court correctly stated that a statutory determinination will not be set aside if any state of facts might be conceived to justify it, *McGowan v. Maryland* 366 U.S. 420 (1961), and that the burden is on the one attacking the statute to negative every conceivable basis which might support it, *Madden v. Kentucky,* 309 U.S. 83 (1940).

Applying these standards, the court determined that §2.02 was founded on a rational basis, specifically mentioning three rational reasons for the legislative requirement that the majority of the Optometry Board be composed of TOA members:

(1) TOA members are more likely to be economically independent than non-TOA members,

(2) TOA members have a greater likelihood of emphasizing the highest quality of eye care, as compared to non-TOA members; and

(3) TOA members are more prone to enforce the Texas Optometry Act than non-TOA members.

Having determined that the legislature might have had these rational reasons for enacting §2.02, the court

properly deferred to the legislature and held §2.02 constitutional. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

In the lower court proceeding, extensive evidence was presented through numerous and lengthly depositions which traced the histories of the Texas optometry profession, the Texas Optometry Board, the Texas Optometric Association, and the long-standing conflict between commercial and professional optometrists. On the basis of these depositions, the court properly concluded that the Texas Legislature indeed had rational reasons for enacting §2.02, and such reasons were not sufficiently negated by the Appellant.

C. *Analysis of the rational reasons for* §2.02.

1. *Professional vs. commercial optometry.* Prepatory to a discussion of the rationale for the statute, it would be helpful to briefly discuss the difference between "professional optometry" and "commercial optometry". Their general meaning is set forth in the deposition of Dr. James J. Riley, past president of TOA.

Generally, "professional" optometry includes those practitioners who are independent and whose historical emphasis has been high quality eye care. More specifically, "professional" optometry embodies a number of concepts which go beyond the minimum requirements of the law. These characteristics include: economic independence from outside control by opticians or department stores, a greater emphasis on continuing education, a greater emphasis on sufficient length for

examination time, examination by appointment rather than a wait-in-line method, gaining patients by professional reputation rather than advertising, and no direct or indirect tie-ins with opticians. (Dr. Riley, 8-17). *The membership of the Texas Optometric Association is comprised solely of professional optometrists.* (Dr. Riley, 31-34).

In contrast, "commercial" optometry includes the optometrists associated with the optical chains such as Texas State Optical (TSO) and Lee Optical. "Commercial" optometry is characterized by a particular mode of practice which emphasizes volume, speed, trade name practice and advertising. It is further characterized by: influence or control of the optometrist by outside interests; tie-ins with opticians; employment or partnership contracts that inhibit professional independence and professional judgment; speed of examinations; high volume of examinations to pay advertising and overhead expenses; less emphasis on continuing education; and less emphasis on law enforcement of optometry statutes. The Texas Association of Optometrists (TAO)[1] is comprised mostly of optometrists in commercial optometry, although a few professional optometrists are members of both TOA and TAO. (Dr. Riley, 17-25).

With this understanding of the difference between commercial and professional optometrists, and with the understanding that TOA is comprised solely of professional optometrists, it is appropriate to proceed with an analysis of the rational reasons for §2.02.

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[1]Not to be confused with T.O.A., Appellee herein.

2. *The first rational basis is that TOA members are more likely than non-TOA members to be econo-ically independent.* The first rational basis for §2.02 centers around economic independence. Obviously, there is a legitimate state interest in having Optometry Board members who are "their own boss" and who are not dominated or controlled by others. The danger of a lack of economic independence increases significantly when a Board member has financial ties to opticians which may preclude his economic independence and which may interfere with his enforcement of the law as a Board member (Dr. Riley, 11).

The evil that the Legislature sought to avoid in §2.02 was domination of the Board by owners of opticianries or optometrists who were employees of opticians or who were controlled by opticians through various financial ties. These types of control (and the dangers inherent in them) were in fact communicated to the members of the legislature in 1969 by TOA optometrists who were from the home districts of the legislators. (Dr. Riley, 80-101).

The Legislature justifiably assumed that one who was employed and controlled by another would be reluctant to "buck his boss" when it comes to enforcing the Optometry Act or voting a certain way as a member of the Optometry Board.

a. *The McGuire contract and the Moore contract.* The potential for domination of a Board member by opticians is exemplified by two exhibits, to wit: Dr. Rogers' contract for sale of a TSO office to Dr. Richard P. McGuire; and Dr. Rogers' contract of employment with Dr. Roy S. Moore. (Exhibits to depositions of Dr.

Riley and Dr. Rogers.) Obviously, the ultimate control over an optometrist is the threat of termination of employment. However, the control exercised over optical chain optometrists is much more extensive than the mere threat of loss of livelihood.

An optician's domination over an optometrist who is an employee or a partner in an optical chain or who is purchasing an optical chain office, destroys any vestige of economic independence of such optometrist. A review of the McGuire and Moore contracts raises real questions of how independent such an optometrist would be if he were appointed to the Optometry Board. *Would he be free from fear of repercussions by the owner of the optical chain?*

The answer is found in the myriad of controls exerted in the "partnership" portion of the McGuire contract:

(1) The optometrist *must* devote full-time to the practice; *must* be present every working day of the year except two weeks' vacation; *must* be there during the two weeks' vacation if there are no substitute personnel available.

(2) The firm of Rogers Brothers *must* be retained, at a fee of 4% of net cash, for advice and supervisory services of accounting, advertising, programming, window display, etc.

(3) The optometrist *must* abide by Rogers Brothers rules, regulations, and policies for the management of the office, including policies concerning examination of patients, progress examinations,

re-examinations, and all other policies regarding contact lenses, transfer patients, patients from other TSO offices. Such rules are determined solely by Rogers Brothers.

(4) All inventory and supplies *must* be purchased from Rogers Brothers, including all optical material of every nature such as frames, lenses, contact lenses, all prescription work, ophthalmic supplies, refracting equipment, and other optical supplies.

(5) All optical laboratory work *must* be done and purchased from Rogers Brothers laboratories.

(6) The optometrist *must* terminate the use of the TSO name if the partnership terminates *for any reason.*

(7) Rogers Brothers can terminate the contract upon misconduct or breach of contract by the optometrist. Misconduct is defined as including "consistent and willful refusal to follow management policies and procedures after receipt of written notice setting forth such deficiencies."

(8) The resident optometrist *must* covenant not to compete within three miles for a 10 year period in the event of the partnership being dissolved (for reasons other than sale).

In the event Dr. Rogers sells the entire local TSO office to the optometrist, very similar controls are imposed on the optometrist. Bear in mind that the following controls continue, ad infinitim, as long as the local

office utilizes the TSO name.[2] Those controls provide that:

(1) Daily sales reports *must* be submitted to the Beaumont, Texas office of Dr. Rogers.

(2) The resident optometrist *must* purchase all optical material, frames, lenses, contact lenses, or prescription work, ophthalmic supplies, refracting equipment and other optical supplies from Rogers Brothers laboratory.

(3) The optometrist *must* abide by Rogers Brothers rules and policies covering the optometrist's hours of operation, personnel procedures, professional fees, and pricing of eyeglasses and other optical materials. Rogers Brothers controls and dictates policies covering examination of patients; progress examination; re-examination; and all other policies including the care and continued care of contact lens patients and transfer patients from other TSO offices.

(4) Dr. Rogers can impose a $50 per day fine, or terminate the contract, and prevent the use of the TSO name if the resident doctor fails to abide by Rogers Brothers rules and policies.

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[2]The control is so extensive that it was the basis of an antitrust lawsuit by Dr. McGuire against Rogers Brothers. A certified copy of the federal court complaint is an exhibit in this case.

(5) The optometrist *must* purchase all his insurance including general liability, workman's compensation, professional liability, fire, hospitalization, and other casualty coverage from a broker designated by Rogers Brothers.

(6) The optometrist *must* use Rogers Brothers' prescriptions forms.

(7) The resident optometrist *must* not compete within certain areas for a period of 5 years from the date their relationship is terminated.

(8) The optometrist *must* be a member of Rogers Brothers pension plan and various benefit programs such as hospitalization insurance and disability insurance.

(9) The optometrist *must* participate in TSO advertising, prorata, in accordance with gross receipts. There is no ceiling on the dollar amount or percentage amount which must be contributed to TSO advertising other than the foregoing.

Various other kinds of economic controls and tie-ins are possible and/or prevalent in commercial optometry. These other types encompass: leasing space or equipment to an optometrist who offices next door to the opticianry; referring patients from the optician to the optometrist; and contracts requiring exclusive use of laboratories. (Dr. Riley, 12, 19, 23).

b. *Dr. Shannon's Testimony.* Dr. Robert Shannon, who was a former owner of the Lee Optical chain

in Texas, candidly admitted that when he was part owner of the chain, Lee Optical controlled the optometrists employed by them, top side and bottom. He further stated that if one of his Lee Optical optometrists had been a member of the state optometry board, his votes and actions would certainly have been constrained by the fear of being fired if he displeased the owners of Lee Optical. (Dr. Shannon, 9-21, 80-81). The entire deposition of Dr. Shannon is repleat with examples of how optometrists who were with Lee Optical in Texas were under the complete control and dominance of the owners of the Lee Optical chain. Dr. Shannon's deposition exposes the hard facts upon which the 1969 Texas Legislature could have relied in requiring that four TOA members be on the Optometry Board. (Dr. Shannon, 9-12, 15, 17, 22, 33-38).

c. *Federal judge analogy.* A vivid analogy might easily be made between the requirements of the Texas Optometry Act and the constitutional requirement that all federal judges have life tenure. It cannot be said with certainty that a particular judge would be a better or worse judge if he did or did not have life tenure. However, it was the intent of the Constitution that federal judges be granted the utmost in economic independence in order that their judgments and enforcement of the law be free from dominance or control by the Congress, the President, or the electorate. By analogy, one of the primary purposes of the Optometry Board is to enforce the law. And, as in the case of federal judges, such enforcement can best be accomplished in an atmosphere of economic independence where there is minimal chance of economic repercus-

sions for unpopular decisions and strict enforcement. (Dr. Riley, 100-102).

In the light of the economic controls traditionally exerted on commercial optometrists, the Legislature might rationally conclude that TOA members are more likely than the non-TOA members to be economically independent and free from outside control. As such, the Legislature had a rational basis for enacting §2.02.

3. *The second rational basis is that TOA members are more likely than non-TOA members to emphasize the highest quality eye care.* There is concrete evidence of legislative awareness of the need for Board members whose primary concern was *quality eye care* rather than high volume and high speed eye care. (Dr. Riley, 78, 95-101).

Because of the track record of TOA and the TOA Code of Practice[3], it is reasonable to believe that TOA members are more likely (as compared to non-TOA members) to emphasize higher standards and higher quality in eye care. The reasons for this greater probability are summarized in the deposition testimony of Dr. James J. Riley (a former president of TOA), Dr. Nelson Waldman (a former state board member and former TOA president), Dr. Robert Shannon (a former commercialist and owner of the Lee Optical chain), and Dr. Chester Pheiffer (Dean of the College of Optometry at the University of Houston).

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[3]An exhibit to the deposition of Stanley Boysen, Executive Director of TOA.

Their testimony can be summarized as follows:

a. *Gaining patients by reputation.* TOA members gain their patients primarily by their professional reputation for competence rather than by advertising or solicitation by opticians. A TOA member's calling card is "competence" and not the "Madison Avenue advertising agent." (Dr. Riley, 10-11; Dr. Waldman, 5; Dr. Shannon, 22).

b. *Properly equipped offices.* TOA membership is a general assurance of properly equipped offices and adherence to the provisions set forth in the TOA code of practice. (Dr. Riley, 9, 148-152).

c. *Continuing education.* TOA membership meant and still does mean an emphasis on continuing education. TOA fought hard for the creation of the Optometry College at the University of Houston (Dr. Riley, 14, 104) and was primarily responsible for the passage of a bill to make continuing education mandatory for license renewal (Dr. Riley, 14, 15-24). Before the passage of the continuing education statute, TOA was active in continuing educational seminars in regional and statewide conventions (Dr. Riley, 14).

In contrast, it was the testimony of Dr. Rogers that he personally opposed the continuing education law and that it was his intention to encourage the Texas Association of Optometrists (primarily composed of commercial optometrists) to challenge the statute in court as being unconstitutional (Dr. Rogers, 247). Sure enough, several weeks after Dr. Rogers made this statement during his deposition, the Texas Association of Optome-

trists filed suit to challenge the constitutionality of that statute.

d. *Length of time for examinations.* TOA members emphasize allowing a sufficient length of time for examinations, whereas the emphasis of the commercial optometrists was on greater volume and speed which nurtures lower quality eye care (Dr. Riley, 9, 18; Dr. Waldman, 43-44, 16-30).

TOA members emphasize more thorough and lengthy examinations for the benefit of the patient. The basic competence requirement takes at least 20 and probably 30 minutes. But the average TOA optometrist probably spends 30 to 45 minutes on the routine patient (Dr. Waldman, 43-44; Dr. Shannon, 35). In contrast, commercial optometry has historically emphasized speed and volume, resulting in greater danger of the examinations being less thorough and accurate (Dr. Waldman, 6-7). In fact, there are examples where the examinations have been much shorter, sometimes as short as eight or ten minutes (Dr. Riley, 18; Dr. Shannon, 33-38).

e. *Appointment rather than waiting in line.* TOA members practice by appointment rather than by a wait-in-line method utilized by commercial optometry (Dr. Shannon, 13-14). The appointment method encourages a more professional examination since it does not place the optometrist under the gun of losing patients who are waiting in the lobby. The professional optometrist is more free to allocate sufficient time for examinations since they are by appointment; and if an unanticipated problem arises, he is in a less perilous situation if he spills over into the next appointment or asks the patient to come back (Dr. Riley, 9, 18).

In contrast, in a commercial practice, the no-appointment/wait-in-line method encourages and forces the optometrist to speed up an examination for fear of losing a multitude of patients waiting in line in the lobby (Dr. Riley, 18). He is under additional pressure because of the advertising implication by the opticianry next door that no appointments are necessary.

f. *Dangers from pressures of high volume.* TOA members are not under the pressures of high volume in contrast to commercial optometrists. When optometrists are under pressure to turn out high volumes of patients, there is a tendency for shortcutting or eliminating important aspects of the examination. This can be very harmful to the patient in many ways.

This proposition was covered in great detail in the deposition of Dr. Nelson Waldman, who was formerly chairman of the Optometry Board and whose opinion is based on numerous investigations and hearings on basic competence violations by optometrists. Dr. Waldman in his deposition thoroughly discussed the steps in an optometric exam, in layman's terms, and pointed out the dangers of exams done in haste for high volume purposes (Dr. Waldman, 6, 7, 16-30, 75-76).

g. *No "locked-in" source of supply.* TOA members are not "locked-in" to one single source of supply or one single laboratory (Dr. Riley, 12; Dr. Shannon, 16; McGuire and Moore contracts). The examining optometrist loses control over quality of lens fabrication when he cannot threaten to quit his laboratory because of poor quality.

A concrete written example of the dangers of a locked-in source of supply is exemplified by the February 15, 1961 letter from Dr. C. T. Shropshire to Lee Optical local offices. Lee instructed their employee optometrists *not* to give pescriptions for certain types of lenses, even if needed or requested by the patient. (Dr. Riley, 79-94).

h. *Verification of lenses.* TOA members are more likely to verify lenses after they return from the laboratory because they are their own boss and are under less time pressure (Dr. Waldman, 73-75; Dr. Shannon, 17-19). Dr. Shannon testified that a correct examination and a correct prescription is useless if the lens prescription is filled incorrectly.

i. *Strong doctor/patient relationship.* TOA members are more apt to maintain quality care because of a strong doctor/patient relationship unlike commercial optometrists (Dr. Riley, 10; Dr. Shannon, 20). When there is no strong doctor/patient relationship and the doctor's identity remains relatively anonymous, the optometrist logically feels less responsible and less fearful of repercussions from the patient's dissatisfaction.

On the basis of this evidence that TOA members are more likely to emphasize and render the highest quality of eye care, the Legislature had a rational basis for enacting §2.02.

4. *The third rational basis is that TOA members are more likely than non-TOA members to enforce the Texas Optometry law.* Historically, TOA was responsible for the Legislature's adoption of the first Optometry

Act in the early 1900's; (Dr. Riley, 12). TOA has been heavily involved in legislative efforts to up-grade the quality of eye care (Dr. Riley, 12).

In contrast, commercial segments of optometry, represented primarily by Lee Optical and Texas State Optical, have been on the other side of the coin in the courthouse for years, contesting the validity and constitutionality of board rules, board statutes, and board enforcement of those rules and statutes. A summary of those many lawsuits and their lack of success is contained in the appendix hereof.

The lawsuits show a consistent history of commercial optometry's repeated attempts to stymie board enforcement of the optometry laws. Two of the most recent lawsuits involve (1) the commercialists' attempt to declare the continuing education statute unconstitutional, and (2) the commercialists' attempt to invalidate a Board memorandum opinion prohibiting optician signs from overlapping an optometrist's office.

The legislature's rationale of law enforcement is further buttressed by the fact that many of the commercialists have been philosophically opposed to the professional responsibility rule of the Optometry Act (§5.13). This is evidenced by commercial optometry's repeated efforts to destroy it by repeal or by litigation. The summary of optometry cases in the appendix shows these attempts. One of the most significant examples of the commercialists' disregard for the law occurred prior to the 1969 enactment of the current law when Drs. Rogers, Geller and Shropshire attempted to repeal the professional responsibility board rule in 1968 without a

quorum of the Board present. At such meeting, Dr. Rogers was also elected president of the Board without a quorum. (Dr. Rogers, 78-79, 80-82, second deposition).

On the basis of the evidence presented to the court of the history of commercial optometry's opposition to the Texas Optometry Law and of TOA's support of the Texas Optometry Law, the court correctly concluded that the Legislature could have determined that TOA members are more likely to enforce the optometry laws as written by the Legislature. As such, the Legislature had a rational basis for enacting §2.02.

5. *The Legislature was actually aware of these rational bases for §2.02.* The foregoing rationales for §2.02 in the 1969 Optometry Act were not "created" for this lawsuit. Quite the contrary. All of these arguments were asserted by members of TOA in the 1968 legislative election and in the 1968 Texas Senate battle over the appointments of Dr. Dan Geller and Dr. C. T. Shropshire to the Texas Optometry Board. Drs. Geller and Shropshire (both associated with Lee Optical) had been appointed by Governor John Connally in late 1967. TOA members fought their confirmation with the facts and arguments set forth earlier in this brief. This information was actually communicated to the members of the Texas Senate. This was presumably one of the reasons why neither optometrist was confirmed by the Senate (Dr. Riley, 34).

These arguments were also communicated to the candidates in the Texas House and Senate legislative races in 1968. (Dr. Riley, 41-50). Lastly, TOA members

all over the state of Texas argued these facts successfully with the members of the Texas House and Senate during the passage of the 1969 Optometry Act (Dr. Riley, 80-101). Part and parcel of these arguments to the legislature was the fact that commercial optometrists were not members of the Texas Optometric Association. (Dr. Riley, 31-34).

On the basis of the foregoing analysis, the lower court was justified in finding that §2.02 was founded on a rational basis.

D. *Reply to Dr. Rogers' new Equal Protection/ First Amendment argument.* In the light of the overwhelming evidence presented to the lower court that there were many rational reasons for the enactment of §2.02, Appellant Dr. Rogers now seeks to shift his challenge from an arbitrary classification argument to a free speech argument. In his Jurisdictional Statement to this Court, Dr. Rogers asserts that §2.02 denies him free speech and the right to association.[4] Dr. Rogers never clearly specifies how his free speech is inhibited nor how his associational rights are infringed by the requirement that a majority of the Optometry Board belong to TOA.

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[4]So far as Appellee can determine, the issue of whether §2.02 violates Dr. Rogers' first amendment rights was not raised in this cause until Dr. Rogers filed his Jurisdictional Statement before this Honorable Court. Appellant, Senior Citizens, has asserted the effect of §2.02 on *their* first amendment rights, but, so far as Appellant TOA can determine, Dr. Rogers has never before asserted that *his* first amendment rights were violated by §2.02. This question was not pleaded, briefed or argued in the court below and there are serious doubts as to whether it is properly before this Court.

Indeed, Dr. Rogers is himself a member of the Optometry Board. His freedom to serve on the Board has not been impaired. And, as active as Dr. Rogers is in espousing the cause of commercial optometry, it is difficult to see any way that §2.02 has inhibited his right to make his opinion known.

Dr. Rogers bases his first amendment attack of §2.02 on the assertion that a TOA-dominated Board might use advertising "as the trigger that prompts them to investigate an optometrist" thereby having a chilling effect on the right to advertise. Such an assertion is nothing more than speculation based on an erroneous assumption that Optometry Board members, who are sworn to uphold the laws, will attempt to circumvent the law by harassing advertising optometrists. This Court would be setting a dangerous precedent if it were to strike down a statute because persons appointed to a board under that statute *might* abuse their power and *might* unjustly harass persons who advertise which, in turn, *might* have a chilling effect on advertising. Dr. Rogers' fears are so speculative that is doubtful they would be ripe for review even if they were justifiable fears. Similarly, because they are so speculative, it is doubtful that Dr. Rogers could show that he has been significantly harmed enough to have standing to present that argument before this Honorable Court.

Dr. Rogers has not shown that his first amendment rights are substantially violated by §2.02 and therefore his equal protection challenge based on the first amendment raises no question which is substantial enough to warrant further consideration by this Court.

II. THE THREE-JUDGE FEDERAL COURT CORRECTLY HELD THAT §2.02 DOES NOT DEPRIVE APPELLANT ROGERS OF DUE PROCESS OF LAW.

A. *Section 2.02 is not invalid under a theory of substantive due process.* Dr. Rogers asserts that §2.02 is unconstitutional under the doctrine of substantive due process in that §2.02 allegedly creates "an irrebuttable presumption that non-TOA members are less qualified to serve on the Board than TOA members."

The court below properly rejected such reasoning, noting that the cases cited as supporting authority by Dr. Rogers all involved fundamental rights which are more stringently protected than non-fundamental rights. The court held that in this case, as in other non-fundamental rights cases which involve state regulation of economic matters, the rational basis test of *New Orleans v. Dukes,* supra, and *Williamson v. Lee Optical,* supra, is to be applied. Applying this rational basis test, the court found that the Legislature clearly had a rational basis for enacting §2.02. (Previously discussed in Part I of this Motion).

The lower court made a further finding concerning the irrebuttable presumption argument that has very important ramifications. It found that, in any event, §2.02 "does not conclusively deny any person a board seat." 438 F.Supp. 428, 433. In other words, unlike any of the other irrebuttable presumption cases, §2.02 does not irrebuttably and absolutely deny a board seat to non-TOA members. A non-TOA member may still serve on the Optometry Board. This is graphically demon-

strated by the fact that Dr. Rogers, a non-TOA member, is currently on the Board.[5]

Since fundamental rights are not substantially deprived by §2.02 and since §2.02 does not conclusively prohibit any optometrist from serving on the optometry board, the three-judge court below was correct in finding that §2.02 is not invalid under the theory of substantive due process.

B. *Section 2.02 does not violate Dr. Rogers' right to procedural due process.* Dr. Rogers next asserts that §2.02 is invalid under a theory of procedural due process in that the Optometry Board, under §2.02, would be inherently biased. Dr. Rogers relies heavily on the reasoning in *Wall v. American Optometric Association, Inc.*, N.D. Georgia 1974 (3-Judge Court) 379 F. Supp. 175, aff'd 419 U.S. 888 (1974), and *Gibson v. Berryhill*, 411 U.S. 564 (1972). He asserts that because the Board has a majority of TOA members, the Board is inherently biased against non-TOA members, and therefore §2.02 is unconstitutional as depriving Dr. Rogers of procedural due process.

The lower court correctly overruled Dr. Rogers' contention citing the language of *Wall* that, "there is no federal constitutional requirement to the effect that legislators and rule makers must be free of bias or interest" 438 F. Supp. 428. The three-judge court further

[5]In fact, since Dr. Rogers is currently sitting on the Board, it is doubtful, once again, that he has standing to raise this substantive due process irrebuttable presumption argument.

pointed out that the case at bar is readily distinguishable from both *Wall* and *Gibson* in that:

(1) Those cases were brought *after* the optometry boards in question had brought charges against the optometrist plaintiffs, and therefore they speak only to the due process issues which surround disciplinary adjudications.

(2) In those cases the board had rule-making power which they had exercised, while in the instant case the Texas Board has no rule-making power to enforce what the legislature has mandated; and

(3) In *Wall* and *Gibson* all members of those boards were members of the state optometric association, while in the case at bar one-third of the Board is composed on non-TOA members.

The court was correct in rejecting Dr. Rogers' due process challenge. The *Wall* and *Gibson* cases heavily relied on by Dr. Rogers involved a court determination of *actual bias* of particular board members who were seeking to enforce the law against commercial optometrists. The instant case did not arise out of a specific disciplinary proceeding and, consequently, the question of actual bias has not been raised. Instead, Dr. Rogers asserts that the TOA members of the Board must be *constructively presumed to be biased*, and that it must be constructively presumed that their bias is so pronounced as to render every action taken by the Board invalid. Dr. Rogers' reasoning is flawed in two significant areas:

(1) Mere membership in a professional organization does not inherently bias a Board member. Individual circumstances vary from person to person and bias in any one individual must be proven as to that individual.

(2) Even if bias of some sort were to be presumed, the degree of bias would vary from person to person and from case to case. In many cases some degree of bias might be present, but unless the bias is of such a degree as to substantially impair fair adjudication, it may be discounted.

Lawmakers and judges at all levels face the problem of bias everyday. They are aware that bias can only be determined on a case by case, person by person basis. Nonetheless, Dr. Rogers asks this Court to declare §2.02 unconstitutional on the basis that in some unspecified case in the future, in which the nature of the case and the parties are not yet known, and in which the identities of the Board members are also unknown, a TOA dominated board might be biased toward the parties. This Court should not declare §2.02 unconstitutional on such a basis.

If this Court were to accept Dr. Rogers' argument, it could effectively mean that any board, whatever its make up, would be constitutionally invalid because of inherent bias. Under Dr. Rogers' argument, membership affiliations, alone, are determinative of Board constitutionality. Where does this argument lead us if, for instance, the AOA affiliation requirement were invalidated and the Governor continued to appoint four

TOA members and two non-TOA members to the Board? Under Dr. Rogers' theory, the Board would still be unconstitutional because the majority TOA members must be presumed biased. Or the Governor might appoint four commercial optometrists who are not members of TOA and two professional optometrists who are members of TOA. Is the Board's make-up then to be unconstitutional because there is a majority of commercial optometrists on the Board and such majority is presumed inherently biased against professional optometry?

Membership affiliation alone does not render a person biased. Bias varies from case to case. To render a statute unconstitutional on the basis of presumed "inherent" bias will open the door to challenges of almost every statute which prescribes the qualification for members of governmental boards.

The simple truth, recognized by the court below, is that bias is something that has to be actually proven in a particular proceeding. It cannot be *assumed* in a constitutional sense. It should be noted that in both the *Wall* and *Berryhill* cases, bias was not assumed and was not an automatic result of the organizational ties of the board members. In the *Wall* case, it was especially clear that organizational affiliations did *not* render the Alabama Optometry Board *inherently* biased. The Court concluded that the Board's actions in *adopting* a rule against corporate practice was valid and was not subject to attack for pecuniary bias. The Court's objection went only to the Board's bias (proven at trial) in *enforcing* the rule. Logically, if organizational affiliations had been sufficient to make the Alabama Board

inherently biased as a matter of law, all actions of the Alabama Board would have been unconstitutional, including the *adoption* of the corporate practice rule as well as the enforcement thereof.

The court below correctly concluded that bias must be determined on a case by case basis and that it is not to be presumed. Since this case did not arise under circumstances in which actual bias in a specific adjudication is alleged, the Court properly found that §2.02 is not invalid under a theory of procedural due process.

III. THE THREE-JUDGE FEDERAL COURT WAS CORRECT IN FINDING THAT §2.02 DOES NOT INFRINGE UPON APPELANT SENIOR CITIZENS' FIRST AMENDMENT RIGHTS TO RECEIVE COMMERCIAL INFORMATION

Appellant Senior Citizens originally challenged §2.02 as an unconstitutional infringement on their First Amendment right to consumer information. This challenge was based on the theory that a board with four TOA members was more likely to enforce the anti-advertising laws then in effect, and thereby more likely to deprive them of their rights.

At the time this suit was brought be Senior Citizens, §5.09 of the Optometry Act prohibited price advertising by optometrists. In this same lawsuit below, appellant Senior Citizens challenged that section as being an unconstitutional infringement on its First Amendment right to consumer information. In the light of this Court's decision in *Bates v. State Bar of Arizona* _____, 97 S. Ct 2691, 53 L.Ed.2d 810 (1977), the

three-judge court below determined that §5.09 is unconstitutional and enjoined its enforcement. No appeal has been taken from that part of the decision below.

After the court decision permitting price advertising by optometrists, the three-judge court below correctly determined that Senior Citizens' First Amendment challenge of §2.02 was mooted. The Optometry Board was enjoined from enforcing the prohibition on price advertising and as such the composition of the Optometry Board became irrelevant to Senior Citizens' First Amendment claims. Under the law as it now stands, optometrists may price advertise and Senior Citizens is not deprived of its right to such information.

However, by this appeal Senior Citizens urges that, despite the new status of the laws, Senior Citizens is still deprived of its First Amendment right to receive commercial information. Its reasoning follows these lines: Section 2.02 requires the Optometry Board to be composed of at least four TOA members. In the pre-*Bates* days, TOA members pressed to enforce the law that was then on the books prohibiting price advertising. Because TOA members enforced §5.09 in the days before it was declared invalid, Senior Citizens fears that the TOA members on the Board *might* ignore the Federal Court order and *might* attempt to enforce §5.09 anyway, either directly or indirectly by harassment of advertising optometrists. Senior Citizens argues that *if* the TOA members do this it *might* have a chilling effect on the optometrists who advertise. Therefore Senior Citizens *might* not receive all of the consumer information they might otherwise have received. Senior Citizens argues

therefore, §2.02 is unconstitutional because it is an unwarranted infringement upon Senior Citizens' right to receive information.

This contention is based upon little more than speculation of what might occur. In fact, Senior Citizens' analysis of their harms consists of one speculation compounded by another. Senior Citizens has shown no harm it has actually suffered, and has shown no likelihood of suffering future harm.

Furthermore, Senior Citizens' bases its analysis upon several erroneous assumptions. The most fatal assumption is that the TOA members of the Texas Optometry Board will seek to undermine the three-judge court's decision on price advertising by optometrists. Members of the Optometry Board are sworn to uphold the law. To assume that they will do the contrary is to accuse the members of the Board of violating their oaths of office, and to argue that the Board itself is unconstitutional because the members thereof *might* not enforce the law they are sworn to enforce is, to say the least, extremely tenuous.

On top of these unwarranted assumptions, Senior Citizens asserts that there *might* be a chilling effect on advertising, and that that *might* limit their access to optometrists prices. Those speculations built upon erroneous assumptions fall far short of the substantial nature of questions which should be heard by this Honorable Court.

The three-judge court below correctly concluded that Senior Citizens' first amendment challenge of §2.02 was

mooted when the prohibition on price advertising was invalidated. Furthermore, even if the questions were somehow deemed not to be moot, the contention that §2.02 deprives Senior Citizens of their right to commercial information is so insubstantial as to warrant no more of this Court's time.

PRAYER

On the basis of the foregoing analysis, Appellee Texas Optometric Association, Inc. respectfully urges that this Honorable Court dismiss this appeal or affirm the judgment of the lower court with respect to this appeal.

Respectfully submitted,

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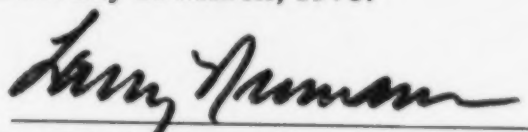
Certificate of Service

I hereby certify that a true and correct copy of Appellant TOA's Motion to Affirm or Dismiss has been deposited in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to Robert Q. Keith, attorney for Dr. N. Jay Rogers, 1400 San Jacinto Building, Beaumont, Texas 77701, Brian R. Davis, attorney for W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, 408 First Federal Plaza, 200 E. 10th Street, Austin, Texas 78701, John G. Tucker, attorney for Dr. E. Richard Friedman, Dr. John B. Bown, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, Dr. Sal Mora, individually, P.O. Box 1751, Beaumont, Texas 77704, Dorothy Prengler, Assistant Attorney General of Texas, attorney for Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, and Dr. Sal Mora, in their official capacity as members of the Texas Optometry Board, Supreme Court Building, P.O. Box 12548, Austin, Texas 78711, and Victor J. Rogers, II, 3434 One Allen Center, Houston, Texas 77002, on this the 20th day of March, 1978.



LARRY NIEMANN

APPENDIX
TO
JURISDICTIONAL STATEMENT

APPENDIX

Summary of Past Litigation Involving Attacks On Validity Of Optometry Law

Broughton v. Pray, No. 99,567 In the 53rd District Court of Travis County, Texas (1954). Commercial optometrist (Texas Optical) sought to invalidate the first rules adopted by the Board prohibiting assumed name practice, advertising, window displays, etc. The district court held all of the rules valid.

Rogers v. Pray, No. D-67812 In the District Court of Jefferson County, Texas (1954). Commercial optometrist (TSO) sued the Board asking $250,000 damages and an injunction from enforcing the Optometry rules. The case was dismissed after three years for want of prosecution.

Carp v. Texas State Board of Examiners in Optometry, No. 95843-B In the 44th Judicial District Court of Dallas County, Texas (1954). Commercial optometrists (Lee Optical) sought to enjoin enforcement of all of the optometry rules and sought $2,250,000 in damages. Upon being put to trial, the commercial optometrists took a non-suit and the case was dismissed.

Shannon v. Baber, No. 11,325B In the 44th Judicial District of Dallas County, Texas and No. 104,397 In the 126th Judicial District Court of Travis County, Texas (1956). Commercial optometrists (Lee Optical) sued to enjoin enforcement of the basic competence rule, the Corporate Practice rule and the Bait Advertising rule and for $2,500,000 damages. After a venue trial in Dallas County, the case was

transferred to Travis County where the commercial optometrists took a non-suit.

Kee v. Baber, 303 S.W.2d 376 Tex. Sup. Ct. (1957). Commercial optometrist (with Lee Optical) challenged validity of Basic Competence Rule, the Corporate Practice Rule, and the Bait Advertising Rule. The Supreme Court upheld the rules.

Carp v. Texas State Board of Examiners in Optometry, No. 108,976 In the 126th Judicial District of Travis County, Texas (1958). Commercial optometrist (Lee Optical) sued to enjoin enforcement of the corporate practice rule. The case was dismissed on motion of the Plaintiffs.

Texas State Board of Examiners in Optometry v. Carp, 343 S.W.2d 242 (Sup. Ct. Tex. 1961) The Board sued to enjoin a commercial optometrist from permitting his employees to practice optometry without a license. The commercial optometrist cross-claimed seeking to enjoin the Board from enforcing any optometry law against him, including those dealing with advertising and practicing in a non-partitioned office. The Supreme Court ruled for the optometry board and against the commercial optometrist.

Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex. Sup. Ct. 1967). Commercial Optometrists (Lee Optical owner) sued to have the Professional Responsibility Rule declared invalid. After seven years in court and two trips to the Supreme Court of Texas, the Professional Responsibility Rule was upheld.

Rogers v. Burton, 496 S.W.2d 673 (Tex. Civ. App. 1973). Commercial optometrist sued to declare invalid the Board interpretation of the Optometry Act grandfather clause re-

garding an optometrist leasing from an optician . The trial court and appeals court held the interpretation valid.

Burton v. Rogers, 504 S.W.2d 404 (Tex. Sup. Ct. 1974). Commercial optometrists (Dr. Rogers, TSO) challenged validity of Board interpretation of §5.09(a) prohibiting optometrists from advertising "reference to price." The case went to the Texas Supreme Court on a venue question which the Commercial optometrists lost.

Texas Optometry Board v. Lee Vision Center, 515 S.W.2d 380 (Tex. Civ. App. 1974, Writ ref. n.r.e.). A commercial optometrist (Lee Optical) challenged validity of Board interpretation of §5.09(a), prohibiting optometrists from advertising "reference to price." The Court held Board interpretation of statute was valid and enforceable.

Rogers v. Friedman et al, No. B-75-277-CA in the U.S. District Court in Beaumont (1975). Commercial optometrist (TSO) seeks to declare unconstitutional AOA affiliation requirement, trade name prohibition, full disclosure in referrals by optometrists, and price advertising prohibition for optometrists. Case still pending.

Fried et al v. Sticksel et al, No. CA-76-0377-G in the U.S. District Court in Dallas (1976). Commercial optometrist (Lee Optical) and TAO (commercial optometry association) sought to declare the continuing education statute unconstitutional. Case dismissed by plaintiffs.

Shropshire v. Sticksel, No. CA3-76-1180-G in the U.S. District Court in Dallas (1976). Commercial optometrist (Lee Optical) seeks to declare invalid the Board's memorandum opinion prohibiting optician signs from overlapping an optometrist's office. Case still pending.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1164

DR. N. JAY ROGERS, O. D. and W. J. DICKINSON, Individually and as President of the TEXAS SENIOR CITIZENS ASSOCIATION, PORT ARTHUR, TEXAS CHAPTER,
Appellants

v.

DR. E. RICHARD FRIEDMAN, O. D., DR. JOHN B. BOWEN, O. D., DR. HUGH A. STICKSEL, JR., O. D., DR. JOHN W. DAVIS, O. D., DR. SAL MORA, O. D., Individually and in their official capacity as members of THE TEXAS OPTOMETRY BOARD; and THE TEXAS OPTOMETRIC ASSOCIATION, INC.,
Appellees

On Appeal from the United States District Court for the Eastern District of Texas (Three-Judge)

BRIEF FOR THE APPELLANTS IN NO. 77-1164

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1164

DR. N. JAY ROGERS, O. D. and W. J. DICKINSON, Individually and as President of the TEXAS SENIOR CITIZENS ASSOCIATION, PORT ARTHUR, TEXAS CHAPTER,
Appellants

v.

DR. E. RICHARD FRIEDMAN, O. D., DR. JOHN B. BOWEN, O. D., DR. HUGH A. STICKSEL, JR., O. D., DR. JOHN W. DAVIS, O. D., DR. SAL MORA, O. D., Individually and in their official capacity as members of THE TEXAS OPTOMETRY BOARD; and THE TEXAS OPTOMETRIC ASSOCIATION, INC.,
Appellees

On Appeal from the United States District Court for the Eastern District of Texas (Three-Judge)

BRIEF FOR THE APPELLANTS IN NO. 77-1164

OPINION BELOW

The memorandum opinion of the three-judge United States District Court for the Eastern District of Texas, Beaumont Division, is reported at 438 F. Supp. 428 (September 12, 1977).

JURISDICTION

In this direct appeal this Court's jurisdiction rests on 28 U.S.C. § 1253. The three-judge court rendered judgment on October 27, 1977. (Appendix A to Jurisdictional Statement in No. 77-1164). Appellants filed their notices of appeal on December 21, 1977. (Appendix B to Jurisdictional Statement in No. 77-1164). Appellants filed their Jurisdictional Statement on February 16, 1978. This Court noted probable jurisdiction on April 17, 1978 and ordered this appeal consolidated with Nos. 77-1163 and 77-1186. ____U.S.____. 98 S.Ct. 1604, ____L.Ed.2d____ (1978).

STATUTES INVOLVED

Section 2.02 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas, enacted in 1969, provides:

> To be qualified for appointment as a member of the board, a person must be a licensed optometrist who has been a resident of this state actually engaged in the practice of optometry in this state for the period of five years immediately preceding his appointment. A person is disqualified from appointment to the board if he is a member of the faculty of any college of optometry, if he is an agent of any wholesale optical company, or if he has a financial interest in any such college or company. *At all times there shall be a minimum of two-thirds of the board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association.*

Other relevant provisions of the Texas Optometry Act have been reproduced in Appendix C to the Jurisdictional

Statement of Dr. N. Jay Rogers and W. J. Dickinson, Individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, Appellants herein, and in Appendix A to their Motion to Affirm filed by them as Appellees in Nos. 77-1163 and 77-1186.

QUESTIONS PRESENTED

1. Does § 2.02 of the Texas Optometry Act, by requiring that at least two-thirds of the Texas Optometry Board be members of the Texas Optometric Association, deprive Appellant, Dr. Rogers, of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution?

2. Is the determination of the district court that there is a rational basis for § 2.02's classification of optometrists according to their membership in a particular organization clearly erroneous and refuted by the evidence?

3. Does § 2.02 of the Texas Optometry Act, by requiring that at least two-thirds of the Texas Optometry Board be members of the Texas Optometric Association, deprive Appellant, Dr. Rogers, of due process of law as guaranteed by the Fourteenth Amendment?

4. Does the requirement of § 2.02 that at least two-thirds of the Texas Optometry Board be members of the Texas Optometric Association impermissibly infringe upon the Appellants', Texas Senior Citizens Association, Port Arthur, Texas Chapter, First Amendment rights to receive valuable commercial information?

5. Does the requirement that at least two-thirds of the Texas Optometry Board be members of the Texas Optometric Association conflict with § 1 of the Sherman Antitrust Act and thereby violate the Supremacy Clause?

STATEMENT OF THE CASE

On August 25, 1975, Dr. N. J. Rogers, a member of the Texas Optometry Board, filed his complaint against the remaining five members of the Texas Optometry Board assailing the constitutionality of § 2.02 of the Texas Optometry Act insofar as that statute dictates that at all times a minimum of two-thirds of the Texas Optometry Board members must be members of a state optometric association recognized by and affiliated with the American Optometric Association.[1] This statutory requirement was attacked (1) as an arbitrary and irrational classification "violative of the free speech and Equal Protection Provisions of the XIVth Amendment," which (2) also denies Dr. Rogers due process of law. (Complaint, App. 11, 15). A permanent injunction was sought against the enforcement of § 2.02.

The Texas Optometry Board is charged by law with administering a comprehensive statutory scheme for the regulation of optometry and opticianry in Texas. The Board:

1. Examines and licenses each optometrist (§§ 3.01, 3.06, 3.07);

2. Appoints committees, conducts investigations, and enforces the Act (§ 2.07);

---

1. Dr. Rogers also attacked the constitutionality of § 5.13(d) and § 5.15(e) of the Act. The three-judge court upheld the constitutionality of § 5.15(e) and Dr. Rogers has not appealed from that portion of the judgment. The three-judge court struck down § 5.13(d)'s prohibition on practice under a trade name on the ground that it violated the First Amendment. The defendant Board members and the Texas Optometric Association, Inc., have appealed from that portion of the trial court's judgment in Nos. 77-1163 and 77-1186. Those appeals have been consolidated before this Court with the appeal of Dr. Rogers and the Senior Citizens in this case.

3. May hold hearings and issue subpoenas (§ 2.10) and bring suit in its own name (§ 2.09);

4. May suspend or revoke the license of an optometrist (§ 4.04);

5. Regulates a variety of practices by dispensing opticians (§§ 5.09(b), 5.10, 5.15).

The Act, in § 2.14, explicitly limits the Board's rulemaking authority to procedural rules and regulations and states:

> The Board shall promulgate procedural rules and regulations only, . . . to govern the conduct of its business and proceedings. . . . The Board shall not have any power or authority to amend or enlarge upon any provision of this Act by rule or regulation or by rule or regulation to change the meaning in any manner whatsoever of any provisions of this Act * * * *

However, the Board has adopted a practice of issuing "Interpretations" of the Act and treats these "Interpretations" as if they were law. (Deposition of Dr. Jack Burton at 37, hereinafter "Burton depo."). The Board advises optometrists and opticians that a violation of a Board "Interpretation" will subject the violator to disciplinary action. (Deposition of Dr. Sal Mora taken on February 5, 1976 at 10, hereinafter "Mora depo. I").

Membership on the Texas Optometry Board is by gubernatorial appointment. A Board member *must* be:

(a) a licensed optometrist;

(b) a Texas resident;

(c) actually practicing for five years immediately preceding appointment. and

a Board member *may not* be:

(a) a faculty member of or have a financial interest in an optometry college or

(b) an agent of or have a financial interest in a wholesale optical company.

Appellants do not complain about these legitimate requirements. Appellants *do* challenge the additional requirement that of the six Board members:

> At all times there shall be a minimum of two-thirds of the Board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association.

In Texas, as in many states, there are two conflicting viewpoints regarding how visual care should be delivered to the public. The differences between these two viewpoints relate solely to differing philosophies over the economic aspects of optometry and opticianry; not to any questions concerning the professional quality of the care and materials that patients ought to be able to expect of visual practitioners.

One viewpoint, strongly held and advocated by those who refer to themselves exclusively as "professional" optometrists, opposes the use of any commercial merchandising or promotional techniques in connection with the examining, prescribing and dispensing functions. The other viewpoint, held by so-called "commercial" optometrists and dispensing opticians, such as Appellant, Dr.

Rogers, who is both a licensed optometrist and a dispensing optician, favors the use of trade names, advertising, multiple offices and related commercial techniques to provide visual services and materials to the public efficiently and at reasonable prices.

The Texas Optometric Association, Inc. (TOA), Appellee herein, endorses the "professional" viewpoint and mode of practice. TOA is a private membership corporation "recognized by and affiliated with the American Optometric Association" (AOA) within the meaning of § 2.02. TOA has been and continues to be the *only* organization in Texas possessing that particular credential. (App. 234).

As of May 12, 1976, a total of 934 Texas-licensed optometrists resided in Texas (Texas Optometry Board print-out dated May 12, 1976 under official certificate). Of that figure, only an outside maximum of 482 optometrists (or slightly more than one-half the total of 934 licensees in residence) were members of TOA actively engaged in practicing optometry. (Deposition of TOA Executive Director, Stanley Boysen, taken on written questions March 5, 1976 at question 5, hereinafter "Boysen depo. II"). In other words, 452 Texas-licensed optometrists residing in Texas were *not* members of TOA. There exists no reason to believe that these proportions have changed to any significant degree during the course of this litigation.

Membership in TOA is limited to optometrists, and even more exclusively to optometrists who *do not:*

1. Practice under any trade name;

2. Engage in any form of commercial advertising, including price advertising; or

> 3. Utilize any commercial management or merchandising techniques such as multiple offices, "commercial" locations for offices, transaction of business as a dispensing optician, and franchise-type purchasing, pricing and delivery of opthalmic goods and services.

(App. 399-416). This is the consequence of the AOA-TOA Codes of Ethics and Rules of Practice, which thoroughly repress commercial activity.

Accordingly, Dr. Rogers and all others who practice like him in the "commercial" mode are strictly precluded from belonging to TOA. Yet *every* Texas-licensed optometrist, TOA or non-TOA, holds exactly the same kind of license, is subject to the same examination and continuing educational requirements, and practices with the same degree of authority. Further, each is subject to the same statutory mandates and restrictions with respect to competence, honesty and proper patient care. No serious dispute exists between the "professional" TOA faction and the "commercial" non-TOA faction over proper patient treatment and proper lens prescriptions. (App. 279-280, 374, Deposition of N. Jay Rogers taken February 5, 1976 at 103, hereinfater "Rogers depo. I," Deposition of N. Jay Rogers taken on April 6, 1976 at 118-120, hereinafter "Rogers depo. II").

Indeed, "commercial" optometry and opticianry are perfectly lawful activities in Texas. State law does not limit to any degree the number of optometry or opticianry offices that a licensed optometrist may own. State law does not limit the number of optometrists or opticians that a licsensed optometrist may employ or have as partners. State law permits a licensed optometrist to transact

business also as a dispensing optician, even though the AOA-TOA codes and rules do not. In this very case the State of Texas has effectively conceded that it may no longer enforce a blanket ban on price advertising by optometrists, having declined to appeal the portion of the judgment that struck down § 5.09(a) of the Act. The official legislative history of the present Optometry Act clearly indicates the Texas Legislature's intention to "generously permit" the continued, unintimidated practice of "commercial" optometry and opticianry. (Proceedings Before Texas Senate Public Health Committee, May 9, 1969 at 28, on file herein under official certificate.)

Furthermore, the record ovewhelmingly establishes the *absence* of any systematic difference in the quality of eye care in Texas depending on whether a given practitioner transacts business "professionally" or "commercially," or whether he or she belongs or does not belong to TOA. Nor is there any qualitative difference in the lenses and frames dispensed by the members of the respective factions, for the same suppliers of lens blanks and ancillary optical merchandise are generally available to all optometrists and opticians. (Rogers Depo. II at 124-25, 150, App. 421-22). According to the affirmative, uncontradicted expert testimony below, the use of *commercial advertising* does not lead to a reduction in the quality of eye care. (App. 340-41, 346-48). The staff of the Federal Trade Commission likewise reached these conclusions, independently, in its exhaustive report, *Advertising of Ophthalmic Goods and Services,* January 1976 at 66-72.

Eligibility for membership in TOA is determined entirely by some twenty geographically drawn "local societies" of TOA. The state-level management of TOA

accepts or rejects an applicant for membership solely on the basis of the "local society's" recommendation. If the "local society" recommends that an optometrist be admitted to TOA, then the optometrist becomes a member of TOA and of AOA. Otherwise, no person is permitted to join TOA. (Deposition of Stanley Boysen on oral questions at 41-48, hereinafter "Boysen depo. I"). Nor do the various "local societies" of TOA use or maintain any written or publicly-knowable criteria for admission, *except for the AOA-TOA Codes of Ethics and Rules of Practice*. Moreover, there are no written or publicly-knowable criteria *whatever* by which admission to TOA at the state level is measured. (Deposition of Dr. James Riley, Jr. at 152, hereinafter "Riley depo.").

With the singular exception of the Texas Optometry Board, no administrative, legislative or judicial board, agency, commission or body in the entire State of Texas is required by constitutive law to draw its controlling majority "at all times" from a specified private association, corporation or other organization composed of its regulatees. See Advisory Commission on Intergovernmental Relations, *Handbook of Governments in Texas*. Section 2.02 of the Texas Optometry Act vests a private faction, notoriously zealous in its opposition to all forms of "commercialism," with perpetual supermajority control over the governmental regulation of optometry and the business of opticianry.

That faction's membership reflects the interests of only half, or slightly more, of all licensed optometrists residing in Texas. By its own rules that faction's membership does not represent the interests of *any* of the dispensing opticians who are regulated by the board that it irreversibly controls. It is undisputed that the Texas Optometry Board

regulates and disciplines dispensing opticians as well as optometrists. (Mora depo. I at 21-22; Burton depo. at 15). Yet, except to the very limited extent that their interests may presently be represented by Dr. Rogers, those persons and entities engaged in business as dispensing opticians have *no* representation on the Board.

This arbitrary and irrational statutory arrangement, which constitutes nothing other than the establishment and perpetuation by the State of Texas of a private government, denies Appellants rights guaranteed them by the free speech provisions of the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth. Dr. Rogers is joined in his attack by W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter (Senior Citizens). (App. 28-39).[2]

On October 27, 1977, the three-judge court entered final judgment upholding § 2.02 of the Texas Optometry Act. The trial court held that § 2.02 "is not in violation of the First and Fourteenth Amendments of the United States Constitution." (See p. A-15, Jurisdictional Statement in No. 77-1164). In its memorandum opinion the lower court accepted Appellees' several asserted "rational bases for the requisite board composition," 438 F. Supp. at 432, and rejected the equal protection, due process and free speech challenges made by Dr. Rogers and the Senior Citizens, who then prosecuted this appeal.

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2. The Senior Citizens also joined in Dr. Rogers' attack on § 5.13 (d) and § 5.15(e) and independently assailed the constitutionality of § 5.09(a), which prohibits price advertising by optometrists. The three-judge court struck down § 5.09(a)'s prohibition on price advertising as violative of the First Amendment and no party has appealed from that portion of the judgment.

SUMMARY OF ARGUMENT

By this brief Appellants demonstrate that § 2.02 of the Texas Optometry Act:

1. Denies Dr. Rogers equal protection of the law by imposing excessive burdens on his First Amendment rights to shape his associations free of governmental repressions and to engage in truthful commercial speech;

2. Denies Dr. Rogers due process of law by (a) arbitrarily, irrebutably presuming him less fit to serve on the Texas Optometry Board simply because he does not belong to TOA and by (b) subjecting him to incessant abuse at the hands of a philosophically biased and economically-interested regulatory board dominated perpetually by TOA;

3. Denies the Senior Citizens their First Amendment right to receive valuable commercial information by forcefully encouraging state-regulated optometrists to affiliate with TOA and adhere to TOA's tenets; and

4. Violates the Supremacy Clause by embracing a private organization, TOA, whose *raison d'etre* violates § 1 of the Sherman Act.

Appellants also establish that the purported "rational bases" for § 2.02 are illusory and clearly erroneous. In short, the evidence of record conclusively permits the singular finding that § 2.02 is based solely upon blatant, invidious discrimination.

Because fundamental associational and free speech interests are at stake, the Appellees bear the burden—

which they have not sustained—to demonstrate § 2.02's necessity to the effectuation of important countervailing state interests. Alternatively, and in any event, no state of facts is conceivable that would justify the discrimination institutionalized by § 2.02.

Furthermore, by its creation and reinforcement of a private government over the optical professions and trades in Texas, § 2.02 operates to deny due process—substantive and procedural; it represses communicative activity protected by the First Amendment; and it lends the state's endorsement, albeit not the state's compulsion, to significant concerted restraints of trade that violate federal antitrust policy.

For all the foregoing reasons the portion of § 2.02 of the Texas Optometry Act now in question is due to be struck down by this Court. Appellants are entitled to the relief prayed in their Conclusion to this brief.

ARGUMENT

I.

THE REQUIREMENT THAT AT LEAST TWO-THIRDS OF THE BOARD BE MEMBERS OF TOA DEPRIVES APPELLANT, DR. ROGERS, OF FOURTEENTH AMENDMENT EQUAL PROTECTION

The vesting of a minimum two-thirds majority of the seats on the Texas Optometry Board in TOA vests control of the Board in a special interest group that represents only half of the State's optometrists. This grant of control over the governmental body that regulates the profession impacts heavily on the rights of the state's

optometrists both (1) to associate to advance views differing from the views expressed by TOA on issues that are of vital importance to the entire profession, and (2) to engage in constitutionally permissible commercial free speech. If an optometrist claims his right to associate with others to advocate a lawful viewpoint in an association other than TOA or simply chooses to exercise his right not to associate with TOA, he is forever foreclosed from an opportunity to be a member of the Board majority or to have his interests advanced by a Board majority. An optometrist who claims his right of commercial free speech or who simply does not desire to abdicate that right by submitting himself to the restrictions of the AOA-TOA Codes of Ethics and Rules of Practice (App. 399-416) is forever foreclosed from an opportunity to be a member of the Board majority or to have his interests advanced by a Board majority.

This heavy impingement upon valuable associational and speech freedoms violates the equal protection assurances of the Fourteenth Amendment, absent a compelling state interest in making an otherwise arbitrary, discriminatory classification. *Williams v. Rhodes,* 393 U.S. 23 (1968).[3] The discriminatory requirement of § 2.02 is

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3. In its Motion to Affirm or Dismiss at page 24 n. 4, TOA has contended that the argument that § 2.02 infringes upon Dr. Rogers' First Amendment rights of association and speech and thereby denies him the equal protection of the laws was not raised in the lower court and is not properly before this Court. The following facts establish that TOA's contention is without support in the record:

(a) Dr. Rogers' Complaint contained a prayer "That the Full Court declare § 2.02 . . . violative of the Free Speech and Equal Protection Provisions of the XIV Amendment to the Constitution of the United States." (App. 15).

(b) In the Brief of Plaintiff and Intervenors filed with the three-judge court, Dr. Rogers argued at pages 110-115 that this type of organizational membership requirement for service on

clearly more than mere economic regulation which will be upheld if there is a rational basis to justify it. *McGowan v. Maryland,* 366 U.S. 420 (1961).

Dr. Rogers does not contend that there is a constitutionally protected right to majority membership on the Board or even to any membership on the Board. However, when the *opportunity* to serve on the Board is denied because of associational ties, or the lack thereof, and the exercise of the right of free commercial speech, fundamental rights protected by the Constitution of the United States are impermissibly invaded. Compare *Keyishian v. Board of Regents,* 385 U.S. 589 (1967) and *Turner v. Fouche,* 396 U.S. 346 (1970).

In *Keyishian* this Court struck down a scheme that denied public employment as a teacher on the basis of mere membership in the Communist party, such membership being prima facie evidence of disqualification for employment in any public position. The statutory presumption infringed too greatly on protected associational interests and could not be justified by the state's interest in keeping subversives out of its public offices. In this case § 2.02 operates on the presumption that if an op-

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a governmental board denies half of the state's optometrists a fair opportunity to exercise their political influence.

(c) The opinion of the three-judge court recognized the argument described in (b), above. See 438 F. Supp. at 431.

(d) The Final Judgment of the three-judge court in regard to § 2.02 holds that "such provision is not in violation of the First and Fourteenth Amendments of the United States Constitution."

(e) Finally, the Brief of Intervenor, Texas Optometric Association, Inc. filed with the three-judge court on September 20, 1976 states at page 4, "Dr. Rogers' primary attack on § 2.02 has been on the basis of procedural due process, substantive due process, and *equal protection* under the *First and Fourteenth Amendments.*" (emphasis added).

tometrist is not a TOA member he is not as qualified to serve on the Board as a TOA member. It disqualifies optometrists from majority membership on the basis of that presumption and violates their rights of association.

The right of association includes the right not to associate as well. In *Elrod v. Burns,* 427 U.S. 347 (1976) the patronage jobs in the sheriff's office were conditioned on membership in the Democratic party. The scheme denied employees the right *not* to associate with the Democratic party, if they wanted to keep their jobs. This Court accordingly found that First Amendment associational rights were violated.

In *Williams v. Rhodes,* 393 U.S. 23 (1968) the restrictions that made access to the ballot for any political parties other than the Democratic and Republican parties more difficult did not force anyone to join those parties but did deny meaningful input to the electoral process if one chose not to join either of those parties. Those restrictions were also found to violate First Amendment rights of association.

Similarly, an optometrist who chooses not to join TOA is denied majority membership on the Board because of his decision *not* to associate with TOA. His opportunity to serve in the majority or be represented by the majority is conditioned on a restriction of his right to freely associate to advance whatever economic, political or social goals he might hold.

The opportunity for majority membership or majority representation on the Board, while not constitutionally guaranteed, is a substantial interest. The Texas Legislature has delegated to the Board the power to determine who will be allowed to practice optometry. Thus,

the decisions of the Board on granting new licenses, applying the Optometry Act and revoking licenses already granted have substantial impact on the livelihood of the state's optometrists. The promulgation of substantive "Interpretations" of the Act can have subtle and not so subtle influences on the manner in which the state's optometrists may practice. In an era when regulatory bodies are increasingly engaging in the business of legislation, the limitation of access to those bodies becomes as inimical to the interests of free association to advocate political and economic viewpoints within an industry or profession as a limitation on access to the ballot becomes in the community-at-large.

A limitation on access to the ballot cannot be upheld if it denies associational rights. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Kusper v. Pontikes*, 414 U.S. 51 (1973). Public employment cannot be made contingent upon the abdication of associational rights. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elrod v. Burns*, 427 U.S. 347 (1976). Section 2.02 of the Texas Optometry Act classifies the state's optometrists on the basis of their association or non-association with TOA and on the of that classification denies non-TOA optometrists any opportunity to attain majority membership or majority representation on the Board. This invidious discrimination violates the non-TOA member's right of association as protected by the First Amendment and denies him the equal protection of the la[illegible]

In *Turner v. Fouche*, 3[illegible] U.S. 346 (1970) this Court struck down the requirement that appointed school board members be freeholders. The Co[illegible]t, in discussing the opportunity to hold appointive off[illegible]ated:

> We may assume that the appellants have no right to be appointed to the Taliaferro County board of education. But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.

396 U.S. at 362-363.

The "invidiously discriminatory disqualifications" of § 2.02 not only violate the federal constitution guarantee of freedom of association but also violate the federal constitutional guarantee of freedom of speech. Membership in TOA means that an optometrist has executed a promise to abide by the AOA-TOA Codes of Ethics and Rules of Practice. (App. 399-416). No price advertising is permitted under these codes and rules. In order to join TOA an optometrist must abdicate in advance his right to engage in truthful price advertising. Since TOA membership is the prerequisite to majority membership on the Board, that majority membership, accompanied by majority representation, is conditioned on an optometrist's abdication of his First Amendment rights. Dr. Rogers and other non-TOA optometrists have the right to be considered for majority membership on the Board without the burden of the discriminatory disqualification found in § 2.02.

It has been recognized by this Court that a public school teacher cannot constitutionally be compelled to relinquish his First Amendment rights as a condition of his employment. *Pickering v. Board of Education,* 391 U.S.

563, 568 (1968). Similarly, the TOA super majority requirement of § 2.02 conditions majority membership and majority representation on the Texas Optometry Board on an optometrist's relinquishment of his right to disseminate truthful price information to the consuming public and violates the Equal Protection Clause of the Fourteenth Amendment.

The state must show a compelling interest in sustaining the discriminatory classification of § 2.02. In this case the state has asserted that its interests lie in insuring proper regulation of visual care providers and maintaining high standards of care. The state argues that for the Optometry Act to be properly enforced the control of the Board must be vested in TOA. (Motion to Affirm on Behalf of the Defendant Board Members in No. 77-1164 at page 4). Before one can accept the state's argument that control must be vested in TOA to further its interests in high standards of visual care one must impute to non-TOA optometrists a disposition not to enforce the Act. However, just as mere differences of political persuasion may not legitimately be used to impute such behavior, *Elrod v. Burns*, supra, 427 U.S. at 365, mere differences over the economics and cosmetics of the profession may not legislatively be used.

Even if one accepted the state's contention that the classification found in § 2.02 furthers its interest in quality eye care, although that contention is not supported by the evidence in this case, it would still be constitutionally infirm since the means the state uses to achieve its legitimate interests cannot be permitted to encroach upon significant First Amendment rights when less restrictive means are available to satisfy its interests. *Kusper v.*

Pontikes, 414 U.S. 51, 58-59 (1973). The state has available to it a broad range of alternative methods to insure that the members of the Board are qualified and will enforce the Act free from outside influences. Indeed, the provisions of § 2.02 not challenged in this case do exactly that without drawing invidiously discriminatory classifications that abridge associational and commercial free speech rights.

There is no showing that the invidiously discriminatory classification set forth in § 2.02 furthers any legitimate state interest. In any event, it constitutes an impermissible means to further any legitimate state interest since it encroaches upon First Amendment rights when less restrictive means are available to satisfy any interest the state might have. The conditioning of majority membership and majority representation on the Board solely on membership in TOA violates protected First Amendment rights of association and speech. It denies Dr. Rogers and all other optometrists similarly situated the equal protection of the laws as guaranteed by the Fourteenth Amendment. The requirement of § 2.02 that at least two-thirds of the Board members be members of TOA must, therefore, be declared unconstitutional and its enforcement must be enjoined.

II.

THE PURPORTED "RATIONAL BASES" FOR § 2.02 ARE REFUTED BY THE EVIDENCE IN THE RECORD

Since the discriminatory classification infringes upon the associational and free speech rights of non-TOA members, it can be sustained only if the state can show a com-

pelling state interest. *Williams v. Rhodes,* 393 U.S. 23 (1968). The three-judge court, however, adopted the less stringent standard applied by this Court in cases involving purely economic regulations. 438 F. Supp. at 432-433. While Dr. Rogers would not agree that this is the applicable standard for review of § 2.02 under the Equal Protection Clause, even under this less stringent equal protection test the classification of § 2.02 must fall since it is wholly arbitrary. *New Orleans v. Dukes,* 427 U.S. 297 (1976).

The three-judge court accepted the three "rational bases" for § 2.02 asserted by TOA. Those "rational bases" are:

> (1) TOA members are more likely to be economically independent than non-TOA members.
>
> (2) TOA members have a greater likelihood of emphasizing the highest quality of eye care, as compared to non-TOA members; and
>
> (3) TOA members are more prone to enforce the Texas Optometry Act than are non-TOA members.

438 F. Supp. at 432.

An analysis of these asserted rational bases in light of the evidence before the Court will confirm the testimony of Dr. E. Richard Friedman, current chairman of the Texas Optometry Board, former president of TOA and defendant-appellee in this case, who testified in response to a question by counsel for Dr. Rogers:

> Q. Well, what is the rational relationship in your mind between a four-two majority and the interest of the people of Texas?
> A. There is none. I have no rational relationship. I think any man that is on the Board, if he is

sworn to uphold the law and to enforce the law, that is what he is there for, no matter what he belongs to.

Q. That is my question. What way does membership in TOA render you better able to serve than non-TOA membership?

A. Not in any manner.

(App. 381).

The first asserted rational basis is that TOA members are more likely to be economically independent than non-TOA members. The testimony of Dr. Hugh Sticksel, defendant Board member points out, however, that there are instances where TOA members as employees or associates of other TOA members might also be subject to economic pressures which might affect their service on the Board. (App. 266-270). As Dr. Sticksel testified, if the interest of the state is to insure that the Board member has no economic pressures asserted against him the only objective criteria would be to distinguish between sole practitioners and all other optometrists. The criteria established, TOA versus non-TOA, cannot rationally be expected to further the purported aim of the classification.

In any event, Article 6252-9B, Texas Revised Civil Statutes, already imposes strict standards of conduct for all public officials, including members of the Texas Optometry Board. Those standards require disclosure of interests in business entities subject to regulation by a regulatory agency such as the Texas Optometry Board and further prohibit the exercise of official powers and duties for the benefit of another in return for some favor or benefit to the public official. *Id.*, §§ 5 and 8.

The testimony of Dr. Robert Shannon, relied upon heavily by TOA in its Motion to Affirm or Dismiss, does little more than establish that Dr. Shannon would not have made a good Board member since he testified that he would expect any optometrist employed by him who might serve on the Board to further Dr. Shannon's interests. (App. 159). Dr. Shannon is now a member of TOA, (App. 100), and unless he has changed since joining TOA one might expect that he would exert the same economic influences on a TOA Board member if that Board member were employed by Dr. Shannon.

The TOA also maintains that contracts entered into between Dr. Rogers and Drs. Moore and McGuire support its contention that TOA members are more likely to be economically independent. There is no evidence that such contracts are widespread among commercial optometrists or that TOA members might not be parties to equally restrictive agreements. Whatever one's judgment might be as to the propriety of these agreements, they do nothing to establish the premise that a TOA member, simply because of TOA membership, is more likely to be economically independent.

The second asserted rational basis is that a TOA member has a greater likelihood of emphasizing the highest quality of eye-care, as compared to non-TOA members. Again this contention is refuted by the evidence, which clearly establishes TOA's true emphasis. The staff report to the Federal Trade Commission, *Advertising of Ophthalmic Goods and Services*, January 1976, at page 61 states, "[t]he basic thrust of associational activities for eye care practitioners has been to foster the aura, if not the reality, of professionalism that comprehensive health care *services*, and not *merchandise* is offered". (Emphasis in

original). The evidence in this case also indicates that the basic thrust of TOA is to foster the aura of professionalism.

The practice Evaluation System of TOA (App. 358-369) awards only 16 out of a possible 100 points for activities directly related to the quality of eye care. The other 84 points are devoted to what one commentator has described as "information constraints".[4] In evaluating optometrists for membership the TOA did not judge optometrists on the quality of eye care rendered to patients but instead judged them on how "professionally" they presented their practice to the public.

In light of this Court's opinion in *National Society Of Professional Engineers v. United States,* ____ U.S. ____ 98 S. Ct. 1355, __ L.Ed.2d __ (1978) an examination of the AOA-TOA Codes of Ethics and Rules of Practice (App. 399-416), which are strictly adhered to by TOA's members, reveals multiple restrictions on any dissemination of price information prior to the patient entering the optometrist's office. Such restrictions may well result in a restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Under the guise of emphasizing high quality, "professional" care the informational constraints imposed by TOA on its members have restricted the flow of commercial information in restraint of trade. In fact, it is the uncontradicted testimony of Dr. Lee Benham, who has studied the eye care industry extensively and who has no economic interest in the subject matter of this case, that these informational constraints actually de-

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4. Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control,* 13 JOURNAL OF LAW AND ECONOMICS 421, 426 (1975). The authors examine a very similar point evaluation system used by the Michigan Optometric Association.

crease the quality of eye care since they raise the cost paid by the consumer and price many people who need glasses out of the market. (App. 340-341).

Furthermore, the testimony of Dr. Friedman is that he would expect a patient to get the same proper examination or refraction and prescription at Dr. Rogers' office as the patient would at Dr. Friedman's office. (App. 374). The TOA has relied heavily on the testimony of Dr. James Riley, Jr. in arguing that TOA members are "more apt" to emphasize the highest quality of eye care, but even Dr. Riley admits that TOA members do not have any magical superiority or competence or honesty or integrity or devotion over non-members of TOA. (App. 252).

Finally, TOA asserts that TOA members are more prone to enforce the Texas Optometry Act than are non-TOA members. Again, the evidence establishes that there is no basis for this assertion. TOA's argument is, in effect, that the non-TOA optometrists in Texas have often challenged optometry laws and, consequently, they cannot be expected to enforce the Act as well as TOA members. However, yet another of the defendant TOA Board members, Dr. John Bowen, testified that the TOA majority was not necessary for the proper administration of the Act (Bowen depo. 3-5), just as Dr. Friedman testified that TOA membership does not make an optometrist more likely to enforce the law. In the face of these unqualified admissions from the TOA Board members who are defendants in this lawsuit, it is clear that the last asserted "rational basis" is nothing more than a fallacious, self-serving assumption. Indeed, Dr. Friedman testified that he routinely violates § 5.15(e) of the Act by failing to inform his patients that they may take their prescriptions to a dispensing optician of their choice.

He further testified that the Board, with a four-member TOA majority, has never taken any action for violation of § 5.15(e), although he believed very few optometrists were obeying this statute. (App. 114-115).

Dr. Nelson Waldman, a TOA leader and former chairman of the Optometry Board, testified that the most frequent violation of the Basic Competency Rule, § 5.12 of the Act, found by the Board's investigators, was the failure to test peripheral vision. This is the simplest of all tests and TOA members violated it as well as non-TOA members. Dr. Waldman testified that perhaps the failure to check peripheral vision is more related to human nature than mode of practice. (Deposition of Dr. Nelson Waldman at 71-73).

The State of Texas and TOA have asked the three-judge court below and would ask this Court to impute ill-willed conduct, an unwillingness to enforce the provisions of the Act, to those optometrists who choose not to join TOA simply because those optometrists are not members of TOA. In *Elrod v. Burns,* 427 U.S. 347 (1976) this Court refused to impute ill-willed behavior to Republican employees of the Cook County Sheriff's Office simply because of their party allegiance. In so holding it was noted that:

> The Court has consistently recognized that mere political association is an inadequate basis for imputing disposition to ill-willed conduct. *Keyishian v. Board of Regents,* 385 U.S. at 606-608, 17 L.Ed.2d 629, 87 S. Ct. 675; *Elfbrandt v. Russell,* 384 U.S. 11, 19, 16 L.Ed.2d 321, 86 S.Ct. 1238 (1966); *Wieman v. Updegraff,* 344 U.S. at 190-191, 97 5.Ed. 216, 73 S. Ct. 215.

427 U.S. at 365 (opinion of Mr. Justice Brennan).

Similarly, virtually half the state's optometrists have chosen not to join TOA and support its political activities on behalf of the "professional" mode of practice. To impute a disposition for non-enforcement of the optometry laws to those optometrists on the basis of their choices not to associate with TOA defies reason. The right of an individual to choose with whom he associates or does not associate for political, social or economic reasons is protected by the First Amendment. That choice cannot be used legitimately to impute ill-willed conduct to non-TOA optometrists.

The evidence before the trial court conclusively established the invalidity of each and every asserted rational basis for the arbitrary classification. No set of facts can be conceived that would support the discriminatory classification of § 2.02. The three-judge court's holding that there was a rational basis for the classification is clearly erroneous. Under the test as stated in *New Orleans v. Dukes*, 427 U.S. 297 (1976) the wholly arbitrary classification of § 2.02 denies Dr. Rogers and all other non-TOA optometrists the equal protection of the law.

III.

THE REQUIREMENT THAT AT LEAST TWO-THIRDS OF THE BOARD BE MEMBERS OF TOA DENIES APPELLANT, DR. N. JAY ROGERS, FOURTEENTH AMENDMENT DUE PROCESS

A. Substantive Due Process

The plain effect of the provision of § 2.02 that requires that a minimum of two-thirds of the Texas Optometry Board be TOA members is to create an irrebuttable pre-

sumption that a non-TOA member, simply because he is not a TOA member, is less qualified and competent to serve on the Board. If the six most intelligent, honest, competent and accomplished optometrists in the state were not TOA members only two could be appointed to the Board. And while any one of those six might be chosen to fill one of the two positions available to non-TOA optometrists, the fact remains that four of them will be statutorily presumed to be incompetent to serve.

The fundamental right to associate, whether the association is to advance political, economic, religious or cultural matters, is protected by the Due Process Clause of the Fourteenth Amendment and any statute that has the effect of infringing that right must be subjected to the strictest scrutiny. *NAACP v. Alabama,* 357 U.S. 449, 460-461 (1958).

When a statutory scheme such as § 2.02 arbitrarily favors one class of similarly situated optometrists over another and infringes upon the fundamental associational rights of the disfavored class of optometrists, it denies them due process of law. Cf. *Vlandix v. Kline,* 412 U.S. 441 (1973); *United States Department of Agriculture v. Murry,* 413 U.S. 508 (1973); *Cleveland Board of Education v. LeFleur,* 414 U.S. 632 (1974); *Carrington v. Rash,* 380 U.S. 89 (1965).

While it is of no precedential value to this Court the dissent in *Cook v. Hudson,* 511 F.2d 744, 750 (5th Cir. 1975), cert. granted 424 U.S. 941, cert. dismd. as improvidently granted, 429 U.S. 165, is a well-reasoned example of a similar due process argument. Judge Clark correctly points out that the State cannot avoid due process scrutiny of a statutory scheme that conditions public employment, which is not a fundamental right, on

the abdication of constitutionally protected rights. *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). Similarly, the state in this case cannot avoid due process scrutiny by arguing that there is no protected right to have equal or majority input on a state regulatory body, or even to serve on the regulatory body. There is, of course, no such constitutionally guaranteed right. However, when the state conditions majority membership on the abdication of one's right to *associate* with groups other than TOA and to espouse a different but equally lawful view on the proper mode of practice, it clearly does impose a burden on the exercise of a fundamental right and forces members of the burdened class to abdicate their fundamental rights in order to obtain eligibility to share in the system of rewards that is arranged by the law establishing the political process in question.

Just as the conditioning of public school employment on a person's decision not to send his or her own children to public schools very probably created an irrebuttable presumption that denied due process of law, 511 F.2d at 751-753 (Clark, J., dissenting), so also the conditioning of eligibility for majority representation and majority membership on the Optometry Board on an optometrists' association, or lack thereof, with TOA creates an irrebuttable presumption that non-TOA optometrists are unfit to constitute a majority of the Board simply because they are not members of TOA. The state has shown no compelling state interest in drawing a sweeping enactment that infringes upon fundamental associational rights. In the absence of a compelling state interest, just as § 2.02 denies "commercial," non-TOA optometrists the equal protection of the laws, it equally denies them due process of law as guaranteed by the Fourteenth Amendment.

B. Procedural Due Process

Since the enactment of § 2.02 of the Texas Optometry Act in 1969, the irreversible minimum 4-2 TOA control of the Texas Optometry Board has affected "everything the Board does," including its primary functions of examining and licensing optometric candidates. (Rogers depo. II. 165-168). The record is replete with examples of how TOA's supermajority domination of the Board has directly and adversely affected Appellant Dr. Rogers, and indeed, continues to affect him adversely even as this appeal awaits decision by this Court.

For example, in 1971 the Board, under the chairmanship of TOA leader Dr. Jack Burton, and *at the instance of the North Texas Society of TOA*, formally instituted groundless charges of fraud against Dr. Rogers. (Rogers depo. II. at 131-132, Burton depo. 70-71, Document #5 in set of Optometry Board certified documents). Normal disciplinary procedures were deliberately circumvented in that the Board scheduled a formal hearing and issued a subpoena without the matter (relating to the technical duration of a lease exemption) having been presented to or acted upon by the enforcement committee. (Burton depo. 7, Mora depo. I at 19). Against no other optometrist has the Board invoked such charges or formal procedures. (Burton depo. 72). Not until 1975 did the TOA supermajority of the Board ever allow Dr. Rogers or any other non-member of TOA to serve on an investigating or enforcement committee. (Burton depo. 30, Friedman depo. 104-106, Rogers depo. II at 6-7, 13-15).

In 1973 a baseless censure resolution was adopted against Dr. Rogers by three of the Board's four TOA members as a smokescreen for the improper conduct

during an examination of candidates by the fourth TOA Board member, who subsequently made a public admission and apology for having violated Board rules designed to assure the confidentiality of candidates' names. (Rogers depo. II at 137-139, Burton depo. 39-57). Only when Dr. Rogers considered filing suit was the censure resolution rescinded. (Rogers depo. II at 139). In 1975 Dr. Rogers was again threatened by the TOA supermajority with disciplinary action, including possible license suspension or revocation, growing out of TOA's views concerning optometric advertising and reference to price by dispensing opticians. (Rogers depo. II at 134-135).

Even currently this pattern of threats and intimidation has not quieted. On May 3, 1978, by vote of the four TOA members against the one vote of non-TOA member Dr. Rogers (the sixth board member—likewise a non-member of TOA—abstaining), the Optometry Board adopted a formal resolution requesting the Attorney General of Texas to "proceed to enforce" an anti-advertising provision, § 5.11, of the Texas Optometry Act against one of Dr. Rogers' offices in Houston, Texas. The four TOA-affiliated Optometry Board members confirmed their resolution by forwarding to the Attorney General a letter setting forth its substance, a certified copy of which letter, signed by Board Chairman and former TOA President, Dr. E. Richard Friedman, is included in Appendix "A" to this brief. The resolution and letter are currently the subjects of continuing proceedings in the trial court.

Dr. Rogers, Appellant herein, has repeatedly been forced to incur substantial costs in time and legal expense to defend against these persistent, economically-motivated, TOA-instigated charges. Such recurrent charges, threats, expenses and resultant injury will continue unabated,

however, as they have since 1969, for so long as the TOA supermajority of the Optometry Board persists in employing the guise of "procedural" rulemaking to enlarge upon and alter the meanings of certain advertising and mode of practice-related sections of the Texas Optometry Act.

Specifically, the Board takes it upon itself—notwithstanding § 2.14 of the Act—to issue "Interpretations" of the optometry statutes. In the meantime the TOA supermajority has caused internal procedures to be adopted whereby it becomes impossible, as a practical matter, for a non-TOA dissenter to require the Board to obtain the Attorney General's opinion on the validity of those "Interpretations". (See Rogers depo. II at 131, Mora depo. I at 12, Friedman depo. 33). In short, one vote or two votes in favor of seeking the Attorney General's opinion is never sufficient against the four TOA votes.

In those instances material to this case in which the Optometry Board has divided "TOA 4—Opposition 1 or 2", the issues have been advertising and the transaction of optical business in "commercial" fashion. (App. 280). In particular, the Court will observe that "Interpretations" 6, 7, 9, 10 and 11 constitute *substantive* constructions of the Texas Optometry Act with respect to the "commercial" issues described therein. Each is the product of a 4-2 vote, TOA against non-TOA. Only upon one occasion, that being "Interpretation" 6, did the supermajority allow the Attorney General to pass on the validity of the "Interpretation". Then, ignoring entirely § 2.14's limitation of the Board's rulemaking authority, the Attorney General of Texas held "Interpretation" 6 to be valid and correct enlargement on the meaning of

§ 5.09(a) of the Act, even though that section does not even mention "reference" to price. Attorney General's Opinion No. M-1029 (1971). We now know, of course, that the court below has found the underlying statute, § 5.09(a), in violation of the First Amendment and the State of Texas has not appealed that decision.

Still, after the Attorney General upheld "Interpretation" 6, the TOA supermajority of the Board was convinced, and remain convinced, that they have "the legal power to adopt whatever interpretations they see fit to adopt". (Rogers depo. II at 131). Furthermore, the TOA members of the Optometry Board and the members of the Texas optometry profession at large, as well as dispensing opticians, consider the Board's "Interpretations" to be viable statements of the law. In other words, people are afraid to violate them for fear of retaliation and retribution. (Mora depo. I at 20).

A concrete example of this threat of retribution occurred in 1970. Dr. E. Richard Friedman, now-Chairman of the Texas Optometry Board, longtime TOA leader and an Appellee herein, filed a complaint with the Board alleging that certain newspaper advertising constituted "gross and deliberate violations of *Board interpretations numbers six and seven*" and that he was "being *discriminated against and hurt economically*". (Document #1 in Optometry Board records under official certificate). (Emphasis added). In his testimony nearly six years later, Dr. Friedman still insisted that, in his view, the "Interpretations" give the Board "guidance in our *enforcement* and in *investigation* procedures *and in any action the Board may take.*" (Friedman depo. 40). (Emphasis added).

Similar admissions are found in the testimony of TOA member and former Optometry Board Chairman, Dr. Jack Burton: "I never thought about them as Board interpretations. *I thought of them as the act itself* and I never worried about interpretations". (Burton depo. 37). (Emphasis added). Dr. Sal Mora, a member of the Optometry Board but not a member of TOA, added that the Board advises practicing optometrists that they will be subject to discipline if they violate Board "Interpretations". (Mora depo. I at 20).

This is not a case presenting an attack on benign peer review or other traditional forms of professional self-regulation under which all, or at least a fair cross-section, of licensees enjoy meaningful opportunity for access to and collective influence upon the regulatory process. Rather, at issue herein is an expressly-legislated scheme of state government in which a discrete segment of the Texas Optometry Board controls the exercise of power belonging to the state, but accounts for that exercise essentially only unto persons with whom that segment's members associate and identify privately. The Fourteenth Amendment circumscribes the powers of the state. Under the Due Process Clause of that Amendment the State of Texas may not, by the enactment and operation of § 2.02 of the Texas Optometry Act, arbitrarily deprive Dr. Rogers and similarly-situated persons of their liberty and property.

The vice of § 2.02 is that "at all times at least two-thirds" of the members of a governmental body are required, by the very law that gives them the power to govern, to continue their active participation in a private organization composed of their fellow regulatees that de-

liberately constrains itself through its internal canons from accommodating or developing negotiable responses to the lawful interests of an almost-equally large number of other, likewise-regulated optometrists. Moreover, those disenfranchised optometrists are joined in the excluded class by all those persons and firms engaged in business in Texas as dispensing opticians.

But apart from the reward conferred upon TOA by § 2.02 *all* Texas Optometrists and *all* dispensing opticians, respectively, stand on equal footing under those remaining sections of the Texas Optometry Act that govern the conduct of their respective enterprises. That genuine discernible, articulable economic and philosophical differences separate the "professional" TOA faction and the "commercial" non-TOA faction is not the consequence of either group's disenchantment or noncompliance with laws validly enacted by the legislature, but is instead the result of thousands of people doing business for many years under two very distinct modes historically permitted by law.

By this appeal Dr. Rogers does *not* seek to have the Court declare that *no* TOA member may serve on the Optometry Board, or that only one or two or three TOA members may serve, or that the Texas Legislature must establish some kind of quota system dividing the Board between TOA members and nonmembers on the basis of proportional representation. Instead, this challenge is based on the simple democratic proposition that the Due Process Clause forbids the state institutionally to embrace and perpetuate private factionalism in a manner whereby one lawful side of a debatable issue obtains an irreducible advantage over the other. Cf. *First National Bank of Boston v. Bellotti*, _____ U.S._____, 98 S. Ct. 1407,

1420-21 (1978); *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976); *City of Eastlake v. Forest City Enterprises, Inc.,* ——— U.S. ———, 96 S. Ct. 2358, 2364 (1976) (State legislature may not delegate its power to a *narrow segment* of the community") (Emphasis in original); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 765 (1976) (If free flow of commercial information is indispensable to resource allocation in a free enterprise system, then it is also essential to formation of intelligent opinion on how that system ought to be *regulated or altered*).

From the opinion below it is obvious that the trial court sought to avoid the procedural due process issues made by the record. The trial court reached, in essence, two conclusions: first, that Dr. Rogers' complaint about the composition of the Optometry Board may not be heard except in the context of a "disciplinary adjudication", which presumes the filing of formal charges against him by the Board; and second, that absent such formal charges, Dr. Rogers may not complain about the past and present conduct of the TOA super-majority because " 'there is no federal constitutional requirement to the effect that legislators and rule makers must be free of bias or interest' ". 438 F. Supp. at 433, quoting *Wall v. American Optometric Association, Inc.,* 379 U.S. 175, 180 (N.D. Ga. Three-Judge Court 1974), *affirmed* 419 U.S. 888 (1974). The trial court then indicated, in dicta, the circumstances under which it believed a procedural due process challenge might become appropriate for review. 438 F. Supp. at 433-34.

Although the trial court sought to distinguish *Gibson v. Berryhill,* 411 U.S. 564 (1973), the distinctions that it

mentioned are immaterial and do not subtract from the current, immediate ripeness of the procedural due process problem for decision by this Court. Furthermore, the portion of the *Wall* holding, summarily affirmed by this Court, from which the trial court quoted is either irrelevant to this case or, alternatively, erroneous when extended to the facts of this case, in which event it should not now be followed. On the other hand, separate portions of the *Wall* decision do furnish strong support for the proposition that Dr. Rogers need not undergo once more the institution of formal adjudicative proceedings in a state tribunal in order to gain standing to present his claim to a federal court.

The record indisputably establishes that, since 1969, Dr. Rogers has been selectively subjected by the TOA supermajority to repeated threats of action against his optometry license because he has chosen, with great success, to conduct his business "commercially." And those threats have not yielded the result TOA desires does not diminish their persistency or the consequent strong circumstantial likelihood that they will continue into the foreseeable future, unless restrained by the Court. Even at present the TOA supermajority has caused a pending threat of legal action to be lodged against Dr. Rogers, see Appendix "A", because he has elected to exercise what in all likelihood is his First Amendment right to advertise optometric goods and services.

The court below reasoned that *Gibson* and *Wall* do not apply because "those cases were brought *after* the optometry boards in question had brought charges against the optometrist plaintiffs . . ." 438 F. Supp. at 433 (Emphasis in original). In *Wall*, however, the three-judge court had properly noted:

> [T]he board asserts that plaintiffs who are not the subject of pending license revocation proceedings do not have standing to challenge any of the rules. This position is clearly refuted both by the Supreme Court's recent decision in *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974) and by the congressional scheme of allowing anticipatory challenge to state proceedings in certain circumstances. If the mere lack of pending state proceedings served to deprive plaintiffs of standing to contest regulatory schemes, plaintiffs would invariably be trapped between Scylla and Charybdis of standing and the doctrine of equitable restraint, discussed below. Such a system would defeat Congress' policy of allowing anticipatory challenges to state proceedings.

379 F. Supp. at 182. As in *Steffel v. Thompson* and *Wall*, supra, the plaintiff herein, Dr. Rogers, requested a declaratory judgment. (App. 11). In preparing its memorandum opinion the court below apparently overlooked this feature of the case. But in any event, the currently-pending threat of legal action, issued by resolution of the Optometry Board's four TOA members, makes § 2.02 of the Act ripe for review of Dr. Rogers' claim at this time.

The trial court also attempted to distinguish *Gibson* and *Wall* on the grounds that the optometry boards in those cases possessed rulemaking power, whereas § 2.14 of the Texas Optometry Act authorizes the Texas Optometry Board to adopt "procedural rules only". See 438 F. Supp. at 433. Presumably Board "Interpretation" 6, which forbade Texas optometrists to make any "reference to price", and which was upheld by the Texas Attorney General, constituted such a "procedural" rule.

Actually, the court below made a very dangerous and questionable assumption about the weight that the apparent meaning of one state statute should be given in testing the constitutionality of the Optometry Board composition prescribed by another statute. The defendants in the *Wall* case made a similar argument in an effort to get the federal court to abstain from decision. The Court rejected the argument:

> It is true that there are certain issues of state law in the case which, if decided favorably to the plaintiffs, would dispose of the case. For example, plaintiffs argue that the rules they challenge are beyond the scope of legislative authority which has been delegated to the board by the legislature. If this contention were upheld, the rules would be struck down and the other issues in the case would be moot. But that is not enough. It is true in many cases that there are state law contentions which could dispose of the case. The fact remains that plaintiffs allege a violation of their federal constitutional rights, for which violation Congress has provided a forum in the federal courts.

379 F. Supp. at 183. In effect, the court below might as well have "abstained" from addressing the constitutionality of § 2.02, even though no party requested abstention or equitable restraint, for in its reliance on the Board's apparent lack of rulemaking authority the trial court, for all practical purposes, abdicated the question presented. The trial court also overlooked the uncontroverted facts that, authorized by state law or not, the Texas Optometry Board promulgates substantive "Interpretations" of the Optometry Act, distributes those "Interpretations" to regulated licensees and dispensing opticians, advises those

persons that action may be taken against them for violations of the "Interpretations", and — according to TOA members of the Board — relies on the "Interpretations" for guidance in "enforcement", "investigation" and "in any action the Board may take". (Friedman depo. 40).

For its final distinction of *Wall* and *Gibson*, the trial court indicated that it found significant the fact that in thoses cases *all* optometry board members were also members of a state association akin to TOA, whereas in Texas one-third (numerically two) of the present Optometry Board members do not belong to TOA. 438 F. Supp. at 433. For a variety of reasons this distinction is immaterial to the procedural due process deficiency of § 2.02 of the Texas Optometry Act.

In the first place, § 2.05(c) of the Act provides that four members shall constitute a quorum for transaction of Board business. Thus, a quorum for any action they desire to take is present any time the four TOA members attend a Board meeting. If TOA does not desire certain action to be taken by the Board, then it is a simple matter for any three of its TOA members to miss the meeting, as occurred continuously for two years between 1967 and 1969 until the Texas Legislature succumbed to TOA's demand for control of the Board. (See Rogers depo. I at 79-80).

Next, four TOA votes are always sufficient against one or two non-TOA votes to effect official Board action and policy as TOA wants it. The Optometry Board's "Interpretations" concerning advertising and mode of practice, described previously, provide prominent examples. Other examples, consisting of about sixty 4-2 votes, TOA against non-TOA, relating to various mode of

practice issues, may be found in the official Minutes of the Texas Optometry Board from 1969 through 1975. Those Minutes, which are part of the record, are simply too voluminous to be sensibly condensed in this brief.

Third, the trial court failed to take account of the fact that, although § 2.02 does not vest TOA with 100% of the Board seats, it still fails to allow Board membership to *any* dispensing optician who is not also licensed as an optometrist. This holds true even though the Optometry Board regulates dispensing opticians. Meanwhile, the interests of those regulatees certainly cannot be said to be served, reflected or even respected by the TOA supermajority, for TOA's Code of Ethics and Rules of Practice strictly prohibit any member from publicizing or holding himself forth as an optician.

Of utmost importance, however, § 2.02 erects a scheme that insures that in any disciplinary or delicensing proceeding a non-TOA defendant will be judged by a clearly biased Board, a minimum two-thirds majority of which will also have substantial pecuniary interests at stake. Under the record before this Court there can be no room for doubt that the four TOA members could not constitutionally sit in judgment of a non-TOA optometrist or dispensing optician in an adjudicative matter. The proceeding itself, infected by the "professional" bias and economic interest of the TOA supermajority, would violate the procedural due process holdings of *Gibson* and *Wall*, supra.

It is simply inconceivable that all four TOA members, having consciously, deliberately promised to abide by the AOA-TOA Codes of Ethics and Rules of Practice as reflecting the best interests of optometrists and the public,

could lay their philosophical biases entirely aside when serving as Optometry Board members. The evidence establishes that they have not been able to do so over the past nine years. Compare *Taylor v. Hayes,* 418 U.S. 488, 501-02 (1974) with *Hortonville Joint School Dist. No. 1 v. Hortonvillle Education Assn.,* __U.S.__ 96 S.Ct. 2308, 2314 (1976) and *Withrow v. Larkin,* 421 U.S. 35, 54-55 (1975). It is equally inconceivable that those TOA Board members could avoid all "substantial" pecuniary interest. According to this Court's decisions, "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law". *Tumey v. Ohio,* 273 U.S. 510, 532 (1927); *In re Murchison,* 349 U.S. 133, 136 (1955). And as Judge Morgan observed in *Wall,* "Those patients would go somewhere, and there is a substantial likelihood that many of them would go to the [TOA Board members] with their patronage". 379 F. Supp. at 188-89.

It therefore follows, necessarily, that the four TOA members of the Texas Optometry Board could not constitutionally sit in judgment of their principal competitor, Dr. Rogers, who is himself a Board member with over twenty successive years of distinguished service. Yet it is against Dr. Rogers that the TOA supermajority's threats, notices, charges, demands, hearings and pleas for legal action have repeatedly been brought and currently pend. (See Appendix "A" to this brief).

In the trial court the Appellees, as defendants, argued that the problem could be cured by two TOA members "disqualifying themselves." (Defendants' Trial Brief at

24). Such an offer is nothing less than a judicial admission of bias and economic interest on the part of the Optometry Board's TOA members. It also overlooks the requirement of state law that four members are necessary for a quorum, not to mention that a similar offer was held "not good enough" in *Wall*. 379 F. Supp. at 189. Furthermore, as the Court below correctly observed, "a constitutionally fatal bias in the statutory composition of a tribunal is not necessarily remedied by an offer of that tribunal to abdicate its statutory function." 439 F. Supp. at 434.

There can be no question that Dr. Rogers' offices have hundreds of thousands, perhaps millions, of optometric patients and that he operates the largest dispensing opticianry firm in the State of Texas. If his license or his good name and reputation were placed in jeopardy—even temporarily, directly or indirectly—at the instance of the Optometry Board's four TOA members, those patients and customers would surely go somewhere—many in all likelihood to the TOA Board members—for examinations, lenses and frames. Conclusively, this risk of pecuniary interest is sufficiently "substantial" under *Gibson, Wall, Tumey* and *Ward v. Village of Monroeville*, 408 U.S. 57 (1972), to peremptorily disqualify all four of the Texas Optometry Board's TOA members from instituting or instigating any action of an adverse nature against Dr. Rogers, in any manner whatever. The potential for abuse is greatly multiplied by TOA's intransigent philosophical bias against Dr. Rogers' "commercial" mode of practice.

In summary, the distinctions drawn by the Court below deserve no weight, for as between Dr. Rogers and the

Board's perpetual TOA supermajority there is no way to escape the procedural due process defect. Dr. Rogers' only meaningful recourse is to the federal courts for protection of his license, which is "property," see *Bishop v. Wood,* 426 U.S. 341, 344 & n. 7 (1976) and *House of Tobacco, Inc. v. Calvert,* 394 S.W.2d 654, 657 (Tex. 1965), and for protection of his good name and reputation, which constitute "liberty." *Board of Regents v. Roth,* 408 U.S. 564, 573-74 (1972). An opportunity to "clear his name" before the Board as it is presently composed would represent a wasteful and meaningless exercise. The problem is not remedied by the availability of judicial review, *de novo* or otherwise, in a state court. *Gibson,* supra, 411 U.S. at 577 & n. 16. Section 2.02 of the Texas Optometry Act is, therefore, a due process derelict. The Attorney General of Texas, however, joined by TOA, chooses to persist in defending § 2.02. See also Attorney General's Opinion No. H-607 (1974). Accordingly, the claims, defenses and interests of all parties are fully displayed, the issues are ripe, and § 2.02 is now due to be declared unconstitutional.

The only palpable obstacle to the relief now sought by Appellants is this Court's memorandum summary affirmance, 419 U.S. 888 (1974), of the three-judge court's entire judgment in *Wall,* by which the court below apparently felt itself bound to some degree under *Hicks v. Miranda,* 422 U.S. 332 (1975). Among a variety of other complaints, the plaintiff optometrists in *Wall* had challenged certain rules, adopted by the Georgia State Board of Examiners in Optometry, that prohibited the practice of optometry in an office for less than four hours per week and further prohibited the practice of optometry in an office "reasonably identifiable" with a mercantile

establishment, retail optical house or dispensing optician. 379 F. Supp. at 179-80 & n. 5.

Those rules, which were adopted by the Georgia board after notice and hearing in apparent compliance with all federal and state due process requirements, were attacked on the grounds that they were beyond the state's power in violation of substantive due process; that they were penal in nature and void for vagueness; that they confiscated plaintiff's property without due process; and that they exceeded the scope of the state legislature's delegable powers. 379 F. Supp. at 187-88.

Relying on *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955) and *North Dakota State Board of Pharmacy v. Snyder's Drug Stores,* 414 U.S. 156 (1973), the three-judge court rejected plaintiffs' arguments and held that the rules themselves, though enacted by a fatally-interested board that was constitutionally incompetent to enforce them, represented a valid exercise of state police power. 379 F. Supp. at 188, 190-91. It was in connection with this holding that the *Wall* court issued its gratuitous comment, quoted by the trial court in this case, that there is "no *federal constitutional* requirement to the effect that legislators and rule makers must be free of bias or interest." *Id.* at 180 (Emphasis in original).

The Appellees herein would now have this Court conclude that, by its unexplicated summary affirmance of *Wall,* this Court necessarily decided that the Georgia board's composition was *not* unconstitutional, or otherwise this Court would not have left standing the portion of the judgment that upheld the validity of the board's rules. For the following reasons, however, Appellees' contention is inapplicable in the context of this case or, al-

ternatively, this Court's summary affirmance in *Wall* was incorrectly entered and the portion of the *Wall* result now in question ought not be extended to this case.

First, the thrusts of both the complaint and the holding in *Wall* with respect to the board's rules was the scope of substantive state police power. The *Wall* plaintiffs also attacked the board's composition on *procedural* due process grounds, but this challenge implicated the challenged board rules only in that it happened to be those rules that the unconstitutionally-composed board intended to apply and enforce. From a procedural due process standpoint the Georgia board might as easily have sought to enforce some other rule or, as in *Gibson,* a state statute restricting certain optometrists' mode of practice. See 411 U.S. at 567-68. Such a difference certainly would not have affected the outcome of the procedural due process litigation. By the same token, the outcome under *Williamson* and *Snyder's Drug Stores* probably would have been the same if some other rule or statute had been challenged on *substantive* grounds, unless such other rule or statute also violated the First Amendment and was challenged on that basis as well. Cf. *Virginia Pharmacy,* supra, 425 U.S. at 755-56 & n. 13.

Under the foregoing analysis the three-judge court's decision and this Court's summary affirmance in *Wall* are explicable on principled grounds. This Court has had occasion to observe that "[a]scertaining the reach and content of summary actions may itself present issues of real substance . . ." *Hicks v. Miranda,* supra, 422 U.S. at 345 n. 14. Further, a summary affirmance by this Court merely affirms the judgment and resolves the issues between the parties, "but not necessarily the reasoning by which it was reached." *Fusari v. Steinberg,* 419 U.S. 379,

391-92 (1975) (Chief Justice Burger concurring). The thrust of the complaint and the appeal in this case differs significantly from the portion of *Wall* under present consideration. In this case Appellants have not contended that any rule, "Interpretation" or other exercise of police power by the Texas Optometry Board or, indeed, by the Board's TOA supermajority, exceeded *substantive* constitutional limitations.

Accordingly, Appellants herein need not attack, defend or otherwise address the sweeping assertion that the Constitution does not require lawmakers to be free of bias or interest, except to demonstrate its irrelevancy. Specifically, the problem in this case is the same one that confronted the courts in *Gibson*s a "State Board of Optometry . . . so biased by prejudgment and pecuniary interest that it could not constitutionally conduct hearings looking toward the revocation of [Appellant's] licenses to practice optometry." 411 U.S. at 578.

The Texas Optometry Board itself is a procedural due process nullity. This condition will persist for so long as TOA continues to insist that its members employ no "commercialism," for so long as AOA and TOA actively oppose all forms of advertising and "commercialism," for so long as the "local societies" of TOA continue to refuse membership to optometrists (and dispensing opticians) whose practices are perfectly lawful but are tainted by "commercialism," and for so long as the Texas Legislature suborns and institutionalizes this system of anticompetitive discrimination by vesting TOA with perpetual supermajority control over the regulatory licensing Board. One or the other —— TOA or § 2.02 of the Texas Optometry Act — has to fall. Section 2.02 is within the reach of

the Due Process Clause and of this Court; TOA, by itself, is not. Therefore, the state statute, in a constitutional sense, is the offender and is due to be struck down.

Second, but in the alternative, this Court erred by summarily affirming the entire judgment in *Wall*. If these cases are to be characterized categorically, and the categorical question to be asked is whether "legislators and rule makers must be free of bias or interest," then the correct answer must be "sometimes." Specifically, the answer must be in the affirmative in this case. Surely the Due Process Clause imposes some limits on the extent to which a state can authorize private parties to exercise the powers of government for their especial benefit and thereupon wash its hands of repressive, discriminatory or anticompetitive consequences. Cf. *Marsh v. Alabama*, 326 U.S. 501 (1946); *City of Eastlake*, supra, _____ U.S. at _____, 96 S.Ct. at 2364; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-92 (1975). This case affords this Court an opportunity to indicate those limits, in the event the Court finds *Wall* indistinguishable.

Upon plenary consideration of cases before it, this Court is not bound by principles of *stare decisis* to follow or extend its own prior summary affirmances. *Gibson v. Berryhill*, supra, 411 U.S. at 576-77; *Colorado Springs Amusements, Ltd. v. Rizzo*, _____ U.S. _____, 96 S.Ct. 3228 (1976) (Brennan, J., dissenting from denial of certiorari); *Fusari v. Steinberg*, supra (Chief Justice Burger concurring). Those dispositions "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). Thus, in no event can *Wall* foreclose a thorough consideration of the procedural due process issues presented by this case.

Following such consideration, Appellants respectfully submit, this Court will be firmly satisfied that § 2.02 of the Texas Optometry Act denies Appellant, Dr. N. Jay Rogers, procedural due process of law, for which reason the applicable portion of the judgment below should be reversed or, alternatively, vacated and remanded for further proceedings consistent with the Court's opinion.

IV.

THE REQUIREMENT THAT AT LEAST TWO-THIRDS OF THE BOARD BE MEMBERS OF TOA INFRINGES UPON THE SENIOR CITIZENS' FIRST AMENDMENT RIGHTS TO RECEIVE VALUABLE COMMERCIAL INFORMATION

The Senior Citizens successfully challenged § 5.09(a) of the Act, a prohibition of price advertising by optometrists, before the three-judge court. The three-court judge based its holding that § 5.09(a) is unconstitutional on the case of *Bates v. State Bar of Arizona*, _____ U.S. _____, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). The Senior Citizens also challenged § 2.02 on First Amendment grounds but this claim was dismissed as moot by the three-judge court in view of its ruling on § 5.09(a). 438 F. Supp. at 432 n. 4. However, although § 5.09(a) has been declared unconstitutional, the challenged portion of § 2.02 still serves as an impermissible restraint on the First Amendment rights of the Senior Citizens to receive valuable price information from optometrists.

By vesting a perpetual minimum two-thirds majority of the Texas Optometry Board in TOA, § 2.02 effectively insures that at all times at least two-thirds of the Board

members will faithfully adhere to and propogate the AOA-TOA Codes of Ethics and Rules of Practice. All TOA members are bound to continue to abide by those rules pursuant to the By-Laws of TOA, Article XIV, § 1 (13). The supplement to the AOA Code of Ethics deems unethical:

> Advertising of any character, which includes or contains any fee whatsoever, or any reference thereto, or any reference to the cost to the patient, whether related to the examination or the cost or fee for lenses, glasses, frames, mountings or any other optometric services, article or device necessary for the patient. (App. 406).

Thus, supermajority control of the Board is irreversibly vested in an organization that strictly prohibits its members from engaging in any form of price advertising. By giving its imprimatur to TOA, the State of Texas encourages membership in a private organization of providers that denies its members the right to engage in truthful price advertising of the goods and services they provide. Any action by the state that contributes to the strength and growth of TOA correspondingly decreases the amount of protected commercial information that can be received by the Senior Citizens, in spite of their First Amendment right to receive it freely. *Virginia Pharmacy*, supra; *Bates*, supra.

When candidates for licenses to practice optometry must be approved by a TOA-dominated Board and when practicing optometrists can lose their licenses on the vote of the four TOA members of the Board, the state has placed direct and substantial pressures on those candidates and licensees to conform their behavior to the

mode of practice for which TOA stands. These pressures are not merely theoretical, but are very real. (See Deposition of Dean Chester Phieffer at 7-8, 16, 26, 30, 33-34, 46-47, 59). And conformity to the TOA mode of practice means foregoing all advertising, including price advertising. By this network of formal and informal restraints the State of Texas has seriously eroded the First Amendment rights of the Senior Citizens to receive protected price information concerning optical goods and services. There has been no showing by the state or by TOA that those restraints are necessary to deal with some evil that the state may legislate to correct. Accordingly, the Senior Citizens are entitled to have § 2.02 stricken on First Amendment grounds.

In the case of *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967), this Court invalidated a decree enforcing a state's policy against unauthorized law practice even though the decree did not directly affect anyone's exercise of constitutionally protected rights. The vice found in the decree was that it substantially impaired the First Amendment rights of a labor union by prohibiting the union from employing salaried attorneys to represent its members in connection with workers' compensation claims. There was no showing that this prohibition was necessary to protect the state's interest in high standards of legal ethics.

Similarly, § 2.02, although perhaps it does not directly deny protected First Amendment rights, substantially impairs the rights of the Senior Citizens to receive valuable commercial information. The state has deliberately vested the power to control the licensure of optometrists and the enforcement of the Optometry Act in an organization whose members are prohibited by its Codes of

Ethics and Rules of Practice from disseminating the commercial price information to which the Senior Citizens are constitutionally entitled. The state explicitly extends its blessing to TOA and implicitly encourages TOA membership. The state thereby endorses TOA's price advertising restrictions, prohibitions that would violate the First Amendment if enacted by the state directly.

The state has nowhere shown that § 2.02's requirement that at all times at least two-thirds of the Board members be TOA members is necessary to protect its interests in maintaining high professional standards among optometrists. High professional standards are substantially guaranteed by a variety of other statutes with which Appellants herein have no quarrel. (See Motion to Affirm filed by Dr. N. Jay Rogers and the Senior Citizens in Nos. 77-1163 and 77-1186 at 24-27). Yet, that requirement operates to impair substantially the rights of the Senior Citizens to receive truthful price information from easily half, or at least 480, of the state's optometrists. Since § 2.02 thereby denies the Senior Citizens their First Amendment rights its unconstitutionality must be declared and its enforcement must be enjoined.

V.

THE REQUIREMENT THAT "AT ALL TIMES AT LEAST TWO-THIRDS" OF THE BOARD MUST BE TOA MEMBERS CONFLICTS WITH § 1 OF THE SHERMAN ANTITRUST ACT AND THEREFORE VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

In pertinent part, Article VI of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the Supreme Law of the Land; * * * *

The relevant law of the United States is § 1 of the Sherman Act, 15 U.S.C. § 1, which declares illegal:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, * * * *

It should now be clear that this Court's landmark decision in *National Society of Professional Engineers v. United States*, __ U.S. __, 98 S. Ct. 1355, __ L.Ed.2d __ (April 25, 1978), rendered eight days *after* this Court noted probable jurisdiction in this case, lays a valid predicate for seriously questioning the composition of the Texas Optometry Board, as prescribed by § 2.02 of the Optometry Act, from a pure Supremacy Clause standpoint as well as from the originally-urged due process, equal protection and free speech perspectives. The emergence of the Supremacy Clause in all likelihood offers a viable ground upon which § 2.02 may be tested without the necessity to reach the substantive constitutional issues.

The conflict between § 2.02 of the Texas Optometry Act, which irrevocably bestows the powers of government upon a private corporate organization whose "ethical" canons openly and notoriously forbid virtually all forms of advertising and commercialism in optometry, and the most basic policies underlying § 1 of the Sherman Act is manifestly obvious. In *Professional Engineers* this Court found a flagrant violation of § 1 of the Sherman Act in a professional society's "ethical" rule that pro-

hibited "the submission of any form of price information to a prospective customer which would enable that customer to make a price comparison on engineering services." ____ U.S. at ____, 98 S. Ct. at 1361, ____L.Ed.2d at ____. (Footnote omitted).

No less than the anti-competitive bidding rule invalidated by this Court in *Professional Engineers* suppressed price competition among the society's members and thereby denied cunsumers the benefits of free and open competition, the Codes of Ethics and Rules of Practice of AOA-TOA prohibit *all* price advertising, most advertising of any other type, the number of offices (no more than three) in which a member may hold an interest, the locations of offices, the use of signs and displays, and the transaction of business as a dispensing optician. (App. 399-416). Moreover, TOA takes great pride in its members' rigid observance of these AOA-TOA competitive restrictions. See Motion to Affirm or Dismiss filed herein by TOA, at 10, 17-18.

In this very case the intervenors-Appellants, W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, have the requisite standing to press a Supremacy Clause challenge to § 2.02 of the Texas Optometry Act. As representative members of the prescription eyewear-consuming public in Texas, the Senior Citizens are denied valuable competitive information and techniques that one-half (or about 480 to 500) of all Texas-licensed optometrists —i.e., those who belong to TOA—would be free to disseminate and utilize both as a matter of federal antitrust law and the First Amendment *but for* the restrictions contained in the AOA-TOA Codes of Ethics and Rules of

Practice. See *Virginia Pharmacy*, supra, 425 U.S. at 756-57 and cases cited. There can likewise be no serious question that those restrictions "substantially affect" interstate commerce under the test enunciated in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976), in that they tend to suppress activity in the marketplace for ophthalmic merchandise and ophthalmic equipment, most of which is manufactured in and shipped from states other than Texas. And as Dr. Lee Benham testified, without contradiction or equivocation:

> Consumers benefit from having more information about their options. If they do not know about alternatives, they cannot respond to them. If the amount of information to consumers is limited, it has the effect of reducing competition which results in higher prices to consumers.

(App. 335).

The Senior Citizens now desire to assert that the State of Texas, through § 2.02 of the Texas Optometry Act, may not "retard, impede, burden, or in any manner control, the operation of the laws [in this case the Sherman Act] enacted by Congress." *McCulloch v. Maryland*, 4 Wheat. 316, 436, 17 U.S. 316, 436 (1819). Section 2.02 is invalid under the Supremacy Clause because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Appellants respectfully suggest that the unfolding Supremacy Clause features of this case possess convincing merit. Nonetheless, Appellants fully realize that those

merits ought to be, but have not been, considered in the first instance by the trial court. Upon their consideration certain subsidiary issues—for example, the relevance of the "state action" antitrust exemption of *Parker v. Brown,* 317 U.S. 341 (1943), as limited in *Goldfarb,* supra, 421 U.S. at 791-92, and *Cantor v. Detroit Edison Co.,* ____ U.S.____, 96 S.Ct. 3110, ____L.ed.2d____ (1976)—are likely to arise. This Court is not in a position to resolve those matters without the benefit of additional proceedings, findings of fact and conclusions of law in the lower court. Accordingly, Appellants respectfully urge this Court to remand the case to the trial court for further proceedings. The three-judge court may then assign the Supremacy Clause question to a single District Judge for decision in accordance with *Rosado v. Wyman,* 397 U.S. 397, 403 (1970), and *Swift & Co. v. Wickham,* 382 U.S. 111 (1965).

In urging this Court to remand, Appellants do not seek a novel disposition of the case. Specifically, 28 U.S.C. § 2106 provides that, incident to its appellate jurisdiction, this Court has the power to "vacate . . . any judgment" brought before it and to "remand the cause" and to "require such further proceedings to be had as may be just under the circumstances." This Court has stated that the provisions of this section are broad enough to give much latitude in fashioning its response to a motion for remand, *United States v. Shotwell Manufacturing Co.,* 355 U.S. 233 (1957), and has recognized that in the exercise of its appellate jurisdiction the Court is bound to recognize any change in law or in fact which has supervened since the entry of the judgment before it. *Patterson v. State of Alabama,* 294 U.S. 600 (1935).

When a potentially-controlling decision of this Court is rendered after the judgment in the case before it for review, the subsequent decision can constitute such a change in law as to justify a remand for further proceedings. *In re Whittington,* 391 U.S. 341 (1968), is an example of a case where this Court remanded in order for the state supreme court to conduct further proceedings in light of the decision of *In re Gault,* 387 U.S. 1 (1967). The logic of *Whittington* is made even more compelling in this case since the supervening change in decisional law presents a non-constitutional ground for decision. Cf. *Ashwander v. TVA,* 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

The case of *Youakim v. Miller,* 425 U.S. 231 (1976) presents a set of facts very similar to those currently before the Court. There the Court vacated and remanded to the three-judge court for further consideration in light of a subsequent Department of Health, Education and Welfare Program Instruction and the Supremacy Clause of the United States Constitution. The HEW instruction was issued after the filing of appellants' Jurisdictional Statement in *Youakim.* The appellants had not presented the Supremacy Clause question to the District Court just as Appellants did not present the Supremacy Clause issue to the three-judge court in this case. Still, this Court vacated and remanded consistent with its "usual practice of avoiding decisions on constitutional matters if a case can be resolved on other grounds." 425 U.S. at 236. By this Court's vacating and remanding the judgment, the District Court is required first to decide any statutory issue instead of first deciding the constitutional issues. *Hagans v. Lavine,* 415 U.S. 528 (1974).

The decision of this Court in *Professional Engineers* provides a nonconstitutional ground for decision in this case. Accordingly, it would be proper for this Court to remand to the three-judge court, with instructions to assign the case to a single District Judge, for consideration of the Supremacy Clause question.

CONCLUSION

For the reasons stated it is respectfully prayed that the judgment of the three-judge court upholding the portion of § 2.02 of the Texas Optometry Act that requires a minimum of two-thirds of the members of the Texas Optometry Board to be members of TOA be reversed and judgment rendered that such portion is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. In the alternative, Appellants respectfully submit that this cause should be remanded to the three-judge court or to a single district judge for further proceedings in view of the enforcement proceedings the Board currently seeks to institute against

Dr. Rogers and in view of this Court's *Professional Engineers* decision and the Supremacy Clause issues.

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief for Appellants in No. 77-1164 have been mailed, postage prepaid, this _____ day of June, 1978 to the following:

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_____

APPENDIX "A"

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

This is to certify that I, Lois Ewald, an Executive Secretary of the Texas Optometry Board and in such capacity have the custody and control of the Board's records, and I hereby certify that the attached is a copy of a carbon copy file record of correspondence dated May 15, 1978, addressed to the Honorable John Hill, Attorney General of Texas.

/s/ LOIS EWALD
Lois Ewald

Date: May 31, 1978

(SEAL)

May 15, 1978

Honorable John Hill
Attorney General of Texas
Supreme Court Building
P. O. Box 12548
Capitol Station
Austin, Texas 78711

Attn: David Kendall

Dear Sir:

The Texas Optometry Board is of the opinion that Section 5.11 of the Texas Optometry Act is valid and intact. Therefore, the Board requests that you enforce said section as it applies to the Texas State Optical office at 7125 Southwest Freeway in Houston, Texas; the means and timing of the enforcement is, of course, left to your discretion.

We understand that the facts of the matter are not in dispute, i.e., the Texas State Optical is a one-door office with a window display.

We are enclosing a copy of the investigative material and correspondence in regard to the matter.

Very truly yours,

E. Richard Friedman, O.D.
Chairman of the Board

ERF/le
Encl.
cc: All Board Members

(SEAL)

FILED
AUG 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * * *

No. 77-1164

* * * *

DR. N. JAY ROGERS, et. al.,
Appellants

v.

DR. E. RICHARD FRIEDMAN, et. al.,
Appellees

ON APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

* * * *

BRIEF FOR THE APPELLEES IN NO. 77-1164

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * * *

NO. 77-1164

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DR. N. JAY ROGERS, et. al.,

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Appellees

ON APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

* * * *

BRIEF FOR THE APPELLEES IN NO. 77-1164

* * * *

STATEMENT OF THE CASE

The procedural background and history of this case have been previously set out in the Brief for the Appellants filed in *Friedman v. Rogers*, No. 77-1163. Appellees herein rely on the Statement of the Case contained in that brief as correctly stating the facts pertinent to the questions before the Court, in addition to the following Statement.

Appellants contend that the evidence produced at trial refutes all of the proferred rational bases for section 2.02 of the Texas Optometry Act. The lower court, however, in noting that the burden is on the one

attacking the legislative arrangement to negate every conceivable basis which might support it, found that Appellants had not carried the heavy burden required of them to prevail on equal protection grounds in the face of Appellees asserted rational bases. The court also held that Appellants substantive and procedural due process arguments were without merit.

The State went beyond what is required of it and presented evidence to support its alleged rational bases for section 2.02. For example, Appellees presented a variety of evidence in support of their contention that Texas Optometric Association (TOA) members are more likely to be economically independent that non-TOA members and thus less likely to be affected by any conflict of interest. Contractual agreements for partnerships and for the purchase of Texas State Optical (TSO) offices entered into between Appellant Board member and other optometrists were admitted at trial and establish a close connection between the buyer and the seller as well as the seller's optical supply company. The State could rationally expect that such contractual arrangements, with the resultant dependence of the buyer optometrist upon the seller optical company, could affect the impartiality of such a buyer as a potential Board member (App. Vol. I, 71-98).

Appellees further introduced contracts between optical companies and practicing optometrists which guaranteed the optometrist a salary but gave both parties the power to terminate with only ten days notice. An optometrist, who was at one time a part owner in a large optical company, testified that if an optometrist employed by him when he was part owner of Lee Optical were a member of the Board and voted against the best interests of Lee Optical, that optometrist would either have been fired or forced to terminate because of unpleasant conditions (App. Vol. II, 159).

While Appellees submit that the State, without more, could rationally require a TOA majority due to TOA members' economic independence and lack of direct economic interest in the operation of the statutory provisions, the present composition is also a result of incidents taking place shortly before the adoption of the Act which might indicate to the Legislature that TOA members are more prone to enforce the Optometry Act than non-TOA members. These incidents are discussed in detail in the Argument and Authorities.

There are several issues raised by Appellants in their brief on the merits that were not raised in the court below and should not be considered by this Court. Appellants have raised the issue that Dr. Rogers's "First Amendment rights to shape his associations free of government repressions" have been infringed. This issue was not tried in the court below nor was there any evidence adduced to support this contention. Appellants have even raised, in their brief on the merits, an issue that was not raised in their Jurisdictional Statement filed with this Court. Appellants claim for the first time that section 2.02 of the Texas Optometry Act conflicts with section 1 of the Sherman Antitrust Act and thereby violates the Supremacy Clause. Neither of these two contentions are properly before this Court.

SUMMARY OF ARGUMENT

The lower court correctly held that section 2.02 of the Texas Optometry Act constitutes a valid exercise of the State's authority to regulate economic matters and the provision of health care within its jurisdiction. There is no argument between the parties concerning the existence of two distinct factions of optometrists in Texas. The dispute centers around the characteristics of the two factions and whether the State may choose to entrust the enforcement of its laws to members of one faction. The record in this case, particularly the documented facts rather than the self-serving opinions,

clearly illustrates the wisdom of the legislative choice at issue, even though the wisdom of the choice is not a proper judicial inquiry. *North Dakota State Board of Pharmacy v. Snyder's Drug Store*, 414 U.S. 156 (1973). It is sufficient that the Legislature could have reasonably believed that section 2.02 would tend to insure the enforcement of the State's visual health legislation.

The enactment of section 2.02 reflects the concern of the Legislature that the commercialists would put their own economic welfare ahead of the statutory goal of adequate eye care for the public. Perhaps the best illustration of the problem which necessitated the enactment of section 2.02 is Appellants' erroneous view of the purpose of membership on the Optometry Board. Members of the Board are selected to represent primarily the Legislature and the public interest, not "the interests of . . . licensed optometrists" as claimed by Appellants. Brief for Appellants at 10. This basic misconception, which permeates the brief filed on behalf of Dr. Rogers, provides an illustration of his point of view and the rationale underlying the State's decision to prevent commercialists from controlling the Board.

The evidence shows that the differences between the two factions in optometry are not limited to their views regarding the propriety of advertising of professional services. The economic independence of TOA members and their lack of any direct pecuniary interest in not enforcing the statute provide ample rationale for the conclusion that TOA members are more likely to enforce the law than non-members. Certainly the equation is not exact, but most non-TOA members are "commercialists" who would directly benefit from the failure of the Optometry Board to enforce many provisions of the law.

Appellants place great weight on the testimony of Board member Dr. Hugh Sticksel, Jr., and his inability

to distinguish between control over a Board member employed by a TOA member and one employed by Texas State Optical. The distinction lies in the interest of those who could exert such control over a Board member. It is clear that the chain optical companies would have much to gain from any influence upon a Board member. Clearly, the less vigorous the enforcement of commercial restrictions, the less economic loss the chain optical companies suffer. Dr. Rogers based this lawsuit on the premise that he would secure more business for TSO if commercial restrictions were removed from the practice of optometry in Texas. A TOA member simply does not have such a inevitable, direct economic interest in these matters. The State has created a Board which will not be controlled by those with such conflicts of interest, but has not precluded their representation on the Board.

Appellants assert that since all optometrists agree on the proper examination of patients, the assertion that TOA members are more likely to emphasize the highest quality of eye care is without basis. What Appellants ignore is the impact of commercial methods upon the likelihood that a patient will receive the care that all acknowledge he should. The Legislature has decided that certain conduct leading to a high volume optometric practice would tend to result in poor quality eyecare. The fact that Dr. Friedman would expect and hope that the same patient care would be given by a TOA member and a commercialist does not indicate that the same would hold true in the absence of vigorously enforced commercial restrictions. Appellants have failed in their burden to show the lack of this rational basis.

Section 2.02 does not create a suspect classification and does not affect the exercise of any fundamental right; thus it is valid if supported by a rational basis. However, the State has surpassed that requirement and

shown that the statutory composition of the Board satisfies a compelling interest. In order to assure the proper enforcement of the law, the Legislature required that a majority of the Board members be "professional" optometrists whose economic independence and lack of any direct pecuniary interest in matters before the Board would render them less likely to be affected by any conflict of interest.

The statute does not affect or penalize the exercise of any person's rights of association. Nor does it create an unconstitutional irrebuttable presumption, violate any due process rights, or deny any person the right to receive commercial information.

ARGUMENT AND AUTHORITIES

I.

INTEREST SUPPORTING SECTION 2.02

The record in this cause clearly illustrates the rationale of the Legislature in providing for a TOA majority on the Board. The economic dependence of commercial optometrists may be discerned from the McGuire and Moore contracts for partnerships and for the purchase of TSO offices (App. Vol. I, 71-98). These instruments establish a close connection between the buyer (the optometrist) and the seller (Rogers Bros.) as well as the seller's optical supply company. The buyer is required to follow seller's rules, regulations and policies for office management. He is required to participate in seller's advertising and to use seller's accounting service. He is required to purchase all optical supplies from seller and is bound to seller's pricing of services and products. The State can rationally expect that such contractual arrangements with the resultant dependence upon the seller could affect the impartiality of such a buyer as a Board member. But the contracts go even further; Rogers Bros. has the right to accelerate

the sale of the office, thereby depriving the buyer of his contractual protection against partnership losses and of his guaranteed salary. It can hardly be contended that such a contractual right could not be explicitly or implicity utilized to bring pressure on a Dr. McGuire or Dr. Moore were they Board members.

Such contracts are not unique among commercial optometrists. Dr. Mora was a party to a contract with Lee Optical which guaranteed him a salary but gave both parties the power to terminate with ten days notice (Deposition of Dr. Mora, taken April 27, 1976 at 8, l. 1-10, 19-21). The possibility of pressure from a seller optical company is clear, and has been recognized by another member of the Board (App. Vol. III, 266).

This type of danger is further documented in Dr. Shannon's deposition. Dr. Shannon was a part owner in Lee Optical at one time, but has since retired "for all practical purposes." Thus, unlike Dr. Rogers, he had no pecuniary interest in the outcome of this lawsuit. Dr. Shannon explained at App. Vol. II, 158-59.

> I would be a far better State Board member today than what I would have been twenty years or more ago because now the interest that I have would be strictly for optometry and for the public, where twenty years ago I would have been interested in trying to get men through the State Board, possibly become employees of mine, and I would have had my business interest probably foremost.

Dr. Shannon's testimony merely confirms what common sense leads one to believe: the chain optical companies have much to gain from any influence upon a Board member. Dr. Rogers acknowledges that many provisions of the Texas Optometry Act are to his economic detriment. (Deposition of Dr. Rogers taken April 6, 1976, at 58, l. 19-24; 59, l. 1-7, 16-18; 63, l. 16;

65, 1. 19; Deposition of Dr. Rogers taken January 13, 1976, at 49-50; 55, 1. 15-19).[1] Some of these provisions, such as those requiring the physical separation of optometrists' offices from opticians' offices, are not under attack in this case. The Legislature was so concerned that this section might not be enforced that they clearly stated their intent in the text of the statute.

> The purpose of this section is to insure that the practice of optometry shall be carried out in such a manner that it is completely and totally separated from the business of any dispensing optician, with no control of one by the other and no solicitation for one by the other, except as hereinafter set forth.

Section 5.15(a), Texas Optometry Act. Clearly the less vigorous the enforcement of this provision, the more money the chain optical companies make, since they would get all of an employed optometrist's business. Similarly, since these statutes constitute restrictions on commercialism with an attendant reduction of optometric patients who would be secured by such commercial means (Rogers Dep. II at 63, 1. 4-5), an individual commercial optometrist would also suffer economic loss from the operation of the statutes. Accordingly, the State has created a Board which will not be controlled by those with such conflicts of interest, but has not precluded such persons from serving on the Board.

Dr. Chester Pheiffer, who has been Dean of the College of Optometry at the University of Houston since 1952, and who has no personal economic interests at stake, recognized the legitimate interests that are served by the composition of the Board. (Deposition of

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[1]Hereinafter, Dr. Rogers's January 13, 1976 deposition will be referred to as "Rogers Dep. I", his April 6, 1976 deposition as "Rogers Dep. II."

Dr. Phieffer at 74-76). TOA members have historically practiced in a different manner from commercialists, (Rogers Dep. II at 71, 1. 2-4, 10-22; 72, 1. 1-11; Rogers Dep. I at 40-41); that is, they have practiced in a manner now required by statute. As Board members they would therefore have little economic interest in avoiding the enforcement of statutory restrictions upon commercial practices which they do not and have not utilized. (Deposition of Dr. Waldman at 40, 1, 24- p. 41, 1. 8).

Appellants assert that since all optometrists agree on the proper examination of patients, the assertion that TOA members are more likely to emphasize the highest quality of eye care is without basis. What Appellants ignore is the impact of commercial methods upon the likelihood that a patient will receive the care that all acknowledge he should. The Legislature has decided that practices leading to a high volume optometric practice would tend to result in poor quality eyecare. The fact that Dr. Friedman would expect and hope that the same patient care would be given by a TOA member and a "commercialist" does not indicate that the same would hold true in the absence of vigorously enforced commercial restrictions. The Legislature concluded that TOA members would be more likely to enforce commercial restrictions, which would ultimately result in better eyecare for the public. Appellants have failed in their burden to show the lack of this rational basis.

While Appellees submit that the State, without more, could legitimately require a TOA majority due to TOA members' economic independence and lack of direct economic interest in the operation of the statutory provisions, the present composition is also a result of the Legislature's knowledge of incidents taking place shortly before the adoption of the Act.

In 1967, Dr. Geller and Dr. Shropshire were nominated to the Optometry Board. Both men worked

for Lee Optical at the time (App. Vol. III, 212). Since there were only five members of the Board, one of whom was Dr. Rogers, these nominations gave the commercialists control of the Board. At a meeting held without a quorum (App. Vol IV, 397), Dr. Rogers was elected president of the Board. (Rogers Dep. II at Exhibit 2). Within months Dr. Rogers had initiated a mail ballot which contained a vote concerning the repeal of the Professional Responsibility Rule. (Rogers Dep. II at Exhibit 3). This Rule had been adopted in 1959 pursuant to an Attorney General's Opinion and a 542 to 31 vote in its favor in a poll of all Texas optometrists. (Rogers Dep. II at exhibit 9). Nevertheless, Drs. Rogers, Geller, and Shropshire voted to repeal the Rule. (Rogers Dep. II at Exhibit 3). There arose a dispute as to whether the Rule had or had not been legally repealed, with the Board's attorneys, such as Mr. Tom Gee, being of the opinion that it had not. (Rogers Dep. II at Exhibits 4, 5, 6, 8). Apparently the dispute was never settled.

In 1969, however, the Legislature codified the Rule. *Compare* Rogers Dep. II, Exhibit 9 *with* Tex. Rev. Civ. Stat. Ann., art. 4552-5.13. The Legislature was aware of the incidents concerning the attempted repeal of the Rule (Rogers Dep. II at 74, l. 11-21; App. Vol. III, 210-13, 237). As counsel for Dr. Rogers noted, the best evidence of the effect of such information on the Legislature is found in its actions (Rogers Dep. II at 94, l. 4). The Legislature rejected the nominations of Drs. Geller and Shropshire (Rogers Dep. II at Exhibits 10, 11), codified the Rule, and in apparent agreement with Dr. Riley that commercial control meant no law enforcement (App. Vol. III, 214), required that a majority of the Board be members of TOA. The State views the actions taken by Drs. Rogers, Shropshire, and Geller as providing an admittedly simple, but nevertheless valid, rationale for a TOA majority. Where regulations operate to the detriment of, and are opposed

by, a group of persons, the State must be allowed to prevent those persons from controlling their enforcement.

II.

EQUAL PROTECTION

Section 2.02 does not violate any person's equal protection rights; it has no demonstrable impact upon rights of association. Dr. Rogers asserts that a non-TOA member "is forever foreclosed from an opportunity to be a member of the Board majority or to have his interests advanced by a Board majority." Brief for Appellants at 14. This statement is patently false since Dr. Rogers has been a member of the majority many times. Any optometrist in Texas may be appointed to the Board and may be a member of a majority whenever he chooses to vote with the majority. Dr. Rogers's assertion that he cannot ever be a member of the Board majority assumes that he and TOA members have diametrically opposite views on every matter coming before the Board. The only Board members who are not able to be members of the majority are those who cannot, for whatever reason, join in the enforcement of the statute.

Dr. Rogers can claim no support from cases such as *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), *Turner v. Fouche*, 396 U.S. 346 (1970), *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Elrod v. Burns*, 427 U.S. 347 (1976). These cases involved restrictions on access to the ballot and absolute prohibitions of employment. As noted by the lower court, the requirement at issue does not deny any person the opportunity to serve on the Board. *Keyishian* and *Elrod* dealt with public employment rather than membership on the governing board of a state agency. The impairment of first amendment rights was "significant;" the exercise

there of was the basis for a denial of employment with the resultant loss of livelihood. *Elrod, supra* at 362. In the *Elrod* case, the purpose of the governmental action was to create an incentive for the sacrifice of first amendment rights. Furthermore, neither *Elrod* nor *Keyishian* relates to the issue herein for they did not concern policy making positions. The "nature of the responsibilities is critical." *Elrod, supra* at 367. In *Williams v. Rhodes, supra*, the governmental action totally frustrated the right to form a political party. And in *Turner v. Fouche, supra*, the Court avoided the question of standard of review by finding that no rational basis supported the qualification for office.

In contrast, the requirement of section 2.02 is based upon the fundamental governmental interest of insuring that administrative agencies administer the law in accordance with the will of the Legislature, rather than in accordance with their own. The major thesis of section 2.02 is "to serve this great end of Government - the impartial execution of the laws . . .." *C.S.C. v. Letter Carriers*, 413 U.S. 548, 564-65 (1973). This interest is particularly strong in this case in light of the State's "special responsibility for maintaining standards among members of the licensed professions." *Ohralik v. Ohio State Bar Association*, 46 U.S.L.W. 4511, 4514-15 (1978).

In its endeavor to insure the enforcement of the law, the Legislature has wrought no significant intrusion upon first amendment rights. Using Appellant's figures, a TOA member has approximately a 1% chance of becoming a Board member as opposed to a non-member's 1/2% chance. It would be irrational to assume, and the evidence herein has not shown, that this provides *any* incentive for the sacrifice of first amendment rights. Certainly that is not the purpose of section 2.02. *See Elrod v. Burns*, 427 U.S. at 361. While

the Optometry Board has no substantive rule making authority and thus its members may not hold what is classicly thought of as policy making positions, the State has no less an interest in the selection of those to whom it entrusts the enforcement of its laws. C.f.*Foley v. Connelie*, 46 U.S.L.W. 4237 (1978).

This case is controlled by *C.S.C. v. Letter Carriers*, 413 U.S. 548 (1973) and *American Communications Association v. Douds*, 339 U.S. 382 (1950). There is perhaps no more compelling governmental interest than the proper enforcement of its laws. *C.S.C. v. Letter Carriers, supra.* In *Douds*, the Court sustained a statute which discriminated against labor unions whose officers had not filed a "non-communist" affidavit. The Court relied upon *Board of Governors v. Agnew*, 329 U.S. 441 (1947) and *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), and, in discussing *Agnew*, the Court stated:

> [I]t can hardly be doubted that voluntary affiliations and beliefs justify a[n]... inference [concerning future conduct] when drawn by the legislature on the basis of its investigation.
>
> This principle may be illustrated by reference to statutes denying positions of public importance to groups of persons identified by their business affiliations. One federal statute, for example, provides that no partner or employee of a firm primarily engaged in underwriting securities may be a director of a national bank. There was no showing, nor was one required, that all employees of underwriting firms would engage in [improper] conduct. Because of their business connections, carrying as they do certain loyalties, interests and disciplines, those persons were thought to pose a continuing

> threat of participation in the harmful activities described above. Political affiliations of the kind here involved, no less than business affiliations, provide rational ground for the legislative judgment that those persons proscribed by §9(h) would be subject to "tempting opportunities" to commit acts deemed harmful to the national economy. In this respect, §9(h) is not unlike a host of other statutes which prohibit specified groups of persons from holding positions of power and public interest because, in the legislative judgment, they threaten to abuse the trust that is a necessary concomitant of the power of office.

339 U.S. at 391-92.

Thus, regardless what standard of review is applied, the Legislature could act to avoid the evils which it had witnessed and which were likely to continue, and could constitutionally require a majority of the Board to be members of an organization which had illustrated its willingness to observe and enforce state law.

Fifteen states either require Board members to be members of state optometric associations which are affiliated with the American Optometric Association or require the governor to select Board members from a list of nominees prepared by such associations. Such statutes have been upheld when challenged, since "the question of public policy involved in the composition of administrative agencies is for the legislature to debate and decide . . .." *Kachian v. Optometrists Examiners Board*, 170 N.W. 2d 743, 748 (Wis. 1969). *See, McCrory v. Wood*, 171 S.2d 241 (Ala. 1965); *Marks v. Frantz*, 298 P.2d 316 (Kan. 1956). *See also, Seidenberg v. New Mexico Board of Medical Examiners*, 452 P.2d 469 (N.M. 1969); *Lanza v. Wagner*, 183 N.E. 2d 670 (N.Y. 1962), *cert.*

denied, 371 U.S. 901; *Ashmore v. Greater Greenville Sewer District*, 44 S.E. 2d 88 (S.C. 1947); *In re Opinion of the Justices*, 42 S.2d 56 (Ala. 1949); *Bradley v. Board of Zoning Adjustment of City of Boston*, 150 N.E. 892 (Mass. 1926); *In re Campbell*, 47 A. 860 (Pa. 1901); *Cohen v. State*, 275 N.Y.S. 2d 719 (N.Y. Sup. 1966); 63 Am. Jur. 2d *Public Officers and Employees* §94 (1972); 16A C.J.S. Constitutional Law §460 (1956).

Furthermore, as recognized by the lower court, section 2.02 constitutes an exercise of the State's power in the area of economic regulation. Consequently, "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

Contrary to the assertion of Dr. Rogers, the Optometry Board has not exercised any substantive rule-making authority. Its interpretations are merely attempts to apply the language of the statute to specific factual situations and thus advise optometrists of what action the Board considers to be a violation of the statute. (Rogers Dep. I at 143, l. 8-16; 164-65; Rogers Dep. II at 133, l. 20-24).

If the Court sees the Interpretation as relevant, they should be examined individually, for the State believes that each Interpretation passed over Dr. Rogers's objection constitutes the proper construction of the statutes in question. These would be numbers 6, 7, 9, 10, 11. (Rogers Dep. I at Exhibits 12-22).

Board Interpretation Number 6 has been upheld as

the correct construction of the law by the Attorney General and the courts of this State. Attorney General Opinion M-1029 (1971); *Texas State Board of Optometry v. Lee Vision Center, Inc.*, 515 S.W.2d 380 (Tex. Civ. App.-Eastland 1974, writ ref'd n.r.e.).

The first portion of Number 7 was upheld in *Texas State Board of Optometry v. Lee Vision Center, supra*, as the correct construction of the law. The court noted that an opticianry could advertise prices only upon receipt of a permit. Article 4552-5.10(b) of the Texas Optometry Act prohibits the advertising of price or reference to price without a permit. Section 5.10(f) provides that advertising pursuant to such a permit shall not "contain any language which directly or indirectly compares the prices." Thus number 7 stands on solid footing as a simple explanation of the statute.

Interpretation number 9 merely paraphrases the prohibition of practice under an assumed name contained in Article 4552-5.13(d). The Interpretation operates on all optometrists alike; in fact it was enforced against a TOA member using the TOA emblem (Rogers Dep. II at Exhibit 1, vote of October 23, 1974). Certainly no "professional" bias is evident here.

Interpretations 10 and 11 require solid opaque partitions between an optometrist and optician and prohibit the use of a common reception or foyer. The reason for these is given in number 10. The Act provides that the practice of optometry "shall be . . . completely and totally separated from . . . any dispensing optician." Art. 4552-5.15(a). Section 5.15(b) requires separation by a solid partition or wall from floor to ceiling and requires optometrists to have a patients' entrance from a public thoroughfare. Certainly the combination of the intent expressed in section 5.15(a) and the specific prohibitions of 5.15(b) provides a sound statutory basis for Interpretation Numbers 10 and 11.

Although Appellees do not see the relevancy of the Board Interpretations to this lawsuit, the Interpretations appear to be correct constructions of the Act and therefore do not even purport to alter the statutory restrictions. Thus, the Interpretations do not result from any supposed bias on the part of the TOA members, nor do they constitute substantive rule-making. In fact, the negative votes of Dr. Rogers and his fellow non-TOA member indicate that the Legislature was wise in providing for the TOA majority.

Of some peripheral interest in this matter are the FTC regulations promulgated May 24, 1978. 43 Fed. Reg., 23992 (June 2, 1978). Section 456.6(c) expressly prohibits the conditioning of membership in organizations such as TOA upon a requirement to refrain from the dissemination of information. Although Appellees contend that they have proven the legitimacy of Section 2.02 despite all of Appellants assertions, the FTC regulations, if upheld by the courts, totally moot Dr. Roger's arguments that "an optometrist who claims his right of commercial free speech or who simply does not desire to abdicate that right by submitting himself to the restrictions of the AOA-TOA Code of Ethics and Rules of Practice is forever foreclosed from an opportunity to be a member of the Board majority or to have his interests advanced by a Board majority." Brief for Appellants at 14. Although the FTC regulations have been challenged in court, as of the time this brief was printed, the regulations were in effect.

III.

DUE PROCESS

A. Substantive Due Process

The lower court dealt with Appellants' irrebuttable presumption argument as follows:

> Plaintiffs' reliance on three Supreme Court cases, *Vlandis v. Kline*, 412 U.S. 441 (1973); *United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), as a basis for their allegation as to the unconstitutionality of their alleged irrebuttable presumption is ill founded. As contrasted with this case, all three of the cited cases involved fundamental rights, to which the irrebuttable presumption analysis has been limited. In the instant case, the Court must follow the reasoning of those non-fundamental rights cases involving sovereign state regulation of economic matters. See, *e.g. New Orleans v. Dukes, supra; Williamson v. Lee Optical of Oklahoma, Inc., supra.* A further consideration in the Court's rejection of Plaintiffs' position is that this article does not conclusively deny any person a Board seat.

Rogers v. Friedman, 438 F.Supp. 428, 433 (E.D.Tex. 1977). The lower court was clearly correct; Appellants' view amounts to a restructuring of the equal protection standards which have long been observed by this Court, since any classification creates the type of presumption challenged here. *See Board of Governors v. Agnew*, 329 U.S. 441 (1947); *Rubins v. Ghezzi*, 512 F.2d 431 (2nd Cir. 1975). Similarly, the standard of review is not heightened by the bare allegation of infringement upon rights of association. As discussed above, there is no evidence in support of this claim and the statute does not infringe in any manner upon the freedom of an optometrist to belong to any association.

B. Procedural Due Process

Appellants' procedural due process claim is also with merit. As stated by the lower court in discussing the

applicability of *Gibson v. Berryhill*, 411 U.S. 564 (1973) and *Wall v. American Optometric Association, Inc.*, 379 F. Supp. 175 (N.D.Ga. 1974), aff'd, 419 U.S. 888 (1974):

> *Wall* and *Gibson*. . . . are both readily distinguishable from the instant case for several reasons: (1) those cases were brought *after* the optometry boards in question had brought charges against the optometrist plaintiffs, therefore they speak directly only to the due process issues which surround disciplinary adjudications; (2) in those cases the board had rule-making power, which they had exercised, while in the instant case the Texas Board has no rule-making power, but only power to enforce what the legislature has mandated; and (3) all members of those boards were members of the State Optometrical Association, while here one-third of the Board is composed of non-TOA members.

Rogers v. Friedman, 438 F. Supp. at 433. Furthermore, in *Gibson* and *Wall* the Court was concerned with an effort "to revoke the licenses of all optometrists . . . employed by business corporations such as Lee Optical . . .."*Gibson v. Berryhill*, *supra* at 578; *Wall v. American Optometric Association, Inc.*, *supra* at 188-89. From the enactment of section 2.02 in 1969 to the present, the Texas Optometry Board has revoked only one license, and there was no appeal taken by the optometrist involved. Unlike the fact situation in *Gibson*, there is no wholesale discrimination and no direct pecuniary benefit to be gained by any TOA Board Member from any official action (Deposition of Dr. Mora taken April 27, 1976 at 13, 1. 1-5). *See Texas State Board of Optometry v. Lee Vision Center, Inc.*, 515 S.W. 2d 380 (Tex. Civ. App.-Eastland, 1974, writ ref'd n.r.e.). By comparison, commercial optometrists are in a position to benefit from the failure to enforce statutory

provisions which restrict commercial practices. Furthermore, even Dr. Rogers and Dr. Mora, the other non-TOA Board member, agree that the Board's enforcement procedure is fair (Rogers Dep. II at 8, l. 21-22; Deposition of Dr. Mora # II at 31, l.4). In many instances, the two non-TOA members of the Board comprise one half of the four Board members who hear the testimony and vote on the action to be taken against an optometrist who has been brought before the Board for a disciplinary proceeding since the two members of the Board who were responsible for investigating do not vote or participate in the proceeding. Often, those two investigating Board members are two of the four TOA Board members. Since it takes a majority of all voting members to discipline an optometrist, the votes of the two non-TOA members would certainly be controlling. Even in situations where three of the four voting members are TOA members, the record demonstrates that the Board has required only that optometrists practice in accordance with the provisions of Texas law. (Deposition of Dr. Burton at 36, l. 1-2; Deposition of Dr. Friedman at 14, l. 21-22; 23, l. 9-11).

Appellants recite a list of actions taken by the Board that Dr. Rogers alleges adversely affect him. Brief for Appellants at 30-32. Although Appellees disagree with the facts as stated in Appellant's brief, the merits of these claims are not before this Court and do not carry constitutional implications. Furthermore, Dr. Rogers's assertion that the Board's composition affects "everything it does" contradicts his own testimony. Brief for Appellant at 30. Dr. Rogers could not explain how the Board's composition affected the examination and licensing of optometric candidates (Rogers Dep. II at 166-67).

Dr. Rogers has attempted to twist a recent action of the Board in order to bolster his procedural due process arguments. Dr. Rogers claims that "[e]ven at present

the TOA supermajority has caused a pending threat of legal action to be lodged against [him]." Brief for Appellants at 37; *See also* Brief for Appellants at 31-32. The merits and the details of the action taken by the Board was discussed in the Brief for Appellants filed in 77-1163 at 9-10,[2] and it is clear that the Board was merely carrying out its statutory duties in asking the Attorney General to enforce section 5.11 of the Act. The provision in question, which prohibits certain types of window displays, has not been declared invalid by any court. At any rate, the issue has been mooted by the fact that the Board, in its desire to observe the law, has withdrawn the request made to the Attorney General on the basis that the new FTC regulations might bar the enforcement of section 5.11. A copy of that letter is reproduced in Appendix "A."

It is typical of Dr. Rogers's position herein that he would claim a procedural due process violation in a request to the State's legal counsel merely to enforce the law. Dr. Rogers's claim that the "currently-pending threat of legal action . . . makes §2.02 of the Act ripe for review of Dr. Rogers' claim at this time," is also without merit since no suit has even been filed and Dr. Rogers has obviously not exhausted his administrative remedies. Furthermore, these contentions emphasize that the State has a compelling interest in preventing commercialists from controlling the Board; they simply would not fulfill the Board's duty to enforce the law.

Dr. Rogers's allegation of pecuniary interest on the part of the Board members arising from the placing in jeopardy of "his license or his good name and reputation" is without support in the record. The Board members have established practices and are able to

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[2]*See also* the Application for Stay and related exhibits filed in this Court in 77-1163, on May 30, 1978.

secure higher fees, presumably because of their reputations. With about one thousand optometrists in Texas, the possibility that these elite few will gain or lose patients due to any restriction on commercial methods or due to the outcome of this lawsuit is remote and speculative. Dr. Benham, a witness for Dr. Rogers, agreed (Benham, Direct Interrogatories No. 20, 23, App. Vol. IV, 338-39.) Similarly, it is unlikely that they would gain patients by virtue of the loss of Appellant's "good name and reputation." In any event, Dr. Rogers will sustain no such loss if he would merely observe the laws of the State.

Appellants have taken notice that the decision in *Wall v. American Optometric Association, Inc., supra,* is contrary to their position herein. Brief for Appellants at 44. Furthermore, the procedural due process questions in *Wall* are not present in the instant case since there is no disciplinary proceeding threatened or underway. Even were such a proceeding in progress, there would be no due process violation. The record of the Board shows the absence of any large scale action against commercial optometrists which would give rise to any pecuniary interest on the part of TOA Board members. Since the Board has restricted itself to its proper function as a policing agency and has not acted outside the scope of its statutory authority, nine years of history conclusively illustrate the absence of the problems present in *Gibson v. Berryhill, supra.*

IV.

RIGHT TO RECEIVE COMMERCIAL INFORMATION

There is no evidence in the record which supports the far-fetched claim that section 2.02 operates to deny

consumers the right receive commercial information.[3] The State has neither encouraged nor discouraged optometrists from joining any association. Certainly the very minimally greater chance of becoming a Board member if an optometrist joins the TOA will not cause a person to refrain from advertising if he desires, and there is no evidence which illustrates that any person has been so deterred. The Board has never acted against an optometrist for lawful advertising; thus there is no "pressure . . . to conform . . . to the mode of practice for which TOA stands." Furthermore, the new FTC regulations, if upheld, would totally moot this argument by outlawing the requirement for TOA membership about which Appellants complain.

V.

ANTITRUST

For the first time since this lawsuit was filed in August, 1975, Appellants claim that section 2.02 conflicts with section one of the Sherman Antitrust Act and therefore violates the supremacy clause of the United States Constitution. This issue has never been a part of this lawsuit, and this Court should not remand this case to the trial court for further proceedings in this regard. If Appellants wish to raise this issue, they can certainly attempt to do so in a separate lawsuit. Furthermore, pursuant to Rule 40 (1)(d) of the Supreme Court Rules, the brief on the merits may not raise additional questions or change the substance of the questions presented in the jurisdictional statement; even Appellants admit that this question has not been raised previously in this suit. Brief for Appellants at 56.

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[3]In fact there was never any admissable evidence produced showing that the Senior Citizens Organization even existed, much less their interest in the suit or how section 2.02 affected them.

Appellants reliance on *National Society of Professional Engineers v. United States*, ___ U.S. ___, 98 S.Ct. 1355 (1978) is misplaced. That case did not involve a state statute, but instead involved an anti-competitive bidding rule of a private organization. Appellants' objections are with the Code of Ethics and Rules of Practice of the TOA, not with the State. Appellants have not even suggested how section 2.02 affects the operation of the Sherman Act, and certainly it does not.[4] In this context, Appellees would reiterate that there is no evidence in this voluminous record to indicate that section 2.02 has deterred any optometrist from engaging in commercial speech.

CONCLUSION

For the reasons stated Appellees respectfully pray that the judgment of the three-judge court upholding section 2.02 of the Texas Optometry Act be in all respects affirmed.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant

STEVE BICKERSTAFF
Assistant Attorney General

RICHARD ARNETT
Assistant Attorney General

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[4]Although Intervenors-Appellants Senior Citizens Association claim the requisite standing to press a supremacy clause challenge to section 2.02 as representative members of the prescription eyewear-consuming public in Texas, there is no evidence in the record to support *any* factual findings regarding the status of the Senior Citizens Group. Appellants presented no evidence to show how the Senior Citizens Group is affected by section 2.02.

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Austin, Texas 78711
(512) 475-3131

CERTIFICATE OF SERVICE

I, Dorothy Prengler, a member of the Bar of the Supreme Court of the United States, hereby certify that three copies of the foregoing Brief for the Appellees has been served on all parties required to be served by placing same in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to all counsel of record: Mr. Larry Niemann, 1210 American Bank Tower, Austin, Texas 78701, Mr. Robert Q. Keith, 1400 San Jacinto Bldg., Beaumont, Texas 77701 and Mr. John Tucker, P. O. Box 1751, Beaumont, Texas 77704 on this the ___ day of August, 1978.

DOROTHY PRENGLER

APPENDIX

A P P E N D I X "A"

TEXAS OPTOMETRY BOARD

COMMERCE PARK, SUITE H-101
5555 North Lamar Austin, Texas 78751

July 3, 1978

Honorable John Hill
Attorney General of Texas
Supreme Court Building
P. O. Box 12548
Capitol Station
Austin, Texas 78711

Attn: David Kendall

Dear Sir:

On May 15, 1978, the Texas Optometry Board forwarded a letter to your attention requesting that the Attorney General's Office enforce Section 5.11 of the Texas Optometry Act as it applies to the Texas State Optical Office at 7125 Southwest Freeway, Houston, Texas, with the means and timing of the enforcement left to your discretion.

At a recent Board meeting on June 28, 1978, the Board voted to send a second communique to you, incorporating the request that your office refrain from seeking to enforce that section of the Act until the Texas Optometry Board has had the opportunity to study the newly-promulgated Federal Trade Commission Rules and Regulations and their possible effect on the enforceability of that section of the Act.

Very truly yours,

s/s
E. Richard Friedman, O.D.
Chairman of the Board

ERF/le

cc: All Board Members

(seal)

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

THIS is to certify that I, Lois Ewald, am Executive Secretary of the Texas Optometry Board and in such capacity have the custody and control of the Board's records, and I hereby certify that the attached is a true and correct copy of a letter dated July 3, 1978, forwarded to John Hill, Attorney General of Texas.

s/s
Lois Ewald
Executive Secretary
Texas Optometry Board

DATE: August 15, 1978

(SEAL)

Supreme Court, U. S.
FILED
AUG 21 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

NO. 77-1163
E. RICHARD FRIEDMAN, O.D., et al
Appellants

V.

N. J. ROGERS, O.D., et al
Appellees

NO. 77-1164
N. J. ROGERS, O.D., et al
Appellants

V.

E. RICHARD FRIEDMAN, O.D., et al
Appellees

NO. 77-1186
TEXAS OPTOMETRIC ASSOCIATION,
INC., et al
Appellants

V.

N. J. ROGERS, O.D., et al
Appellees

Consolidated Appeals From
The United States District Court
For the Eastern District of Texas
Beaumont Division

BRIEF OF APPELLEE, TEXAS OPTOMETRIC ASSOCIATION, INC., IN SUPPORT OF THE CONSTITUTIONALITY OF SECTION 2.02 OF THE TEXAS OPTOMETRY ACT

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Texas Optometric Association, Inc.

August 21, 1978

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 77-1163
E. RICHARD FRIEDMAN, O.D., et al
Appellants
V.
N. J. ROGERS, O.D., et al
Appellees

NO. 77-1164
N. J. ROGERS, O.D., et al
Appellants
V.
E. RICHARD FRIEDMAN, O.D., et al
Appellees

NO. 77-1186
TEXAS OPTOMETRIC ASSOCIATION,
INC., et al
Appellants
V.
N. J. ROGERS, O.D., et al
Appellees

BRIEF OF APPELLEE, TEXAS OPTOMETRIC ASSOCIATION, INC., IN SUPPORT OF THE CONSTITUTIONALITY OF SECTION 2.02 OF THE TEXAS OPTOMETRY ACT

Opinion Below

The opinion of the District Court for the Eastern District of Texas, Beaumont Division, entered on September 12, 1977, is reported at 438 F. Supp. 428. A copy of that opinion may be found in the Jurisdictional Statement filed by Appellants.

Jurisdiction

This suit was brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331, 1343, 2201, 2281, and 2284 in the United States District Court for the Eastern Division of Texas, to enjoin as unconstitutional the enforcement of Sections 2.02, 5.09(a), 5.13(d) and 5.15(e) of the Texas Optometry Act. A three-judge district court was convened to hear this cause as was then required by 28 U.S.C. §2281 and 2284. The final judgment of the court was entered on October 27, 1977, declaring a portion of §5.09(a) and §5.13(d) unconstitutional, and declaring §2.02 and 5.15(e) constitutional. Notice of appeal was filed in the court below by the Texas Optometric Association, Inc. on December 22, 1977, by the State of Texas on December 20, 1977, and by Dr. Rogers, et al, on December 21, 1977. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253 and §2101(b). This Court noted probable jurisdiction in this case and consolidated the three separate appeals on April 17, 1978.

Questions Presented

I. Whether the Three-Judge Federal Court erred in determining that §2.02 of the Texas Optometry Act has a rational basis and does not deprive Appellant Rogers of equal protection of the laws.

II. Whether the Three-Judge Federal Court erred in determining that §2.02 does not deprive Appellant Rogers of due process of law.

III. Whether the Three-Judge Federal Court erred in determining that §2.02 does not infringe upon Appellant

Texas Senior Citizen Association's First Amendment rights to receive commercial information.

IV. Whether this Court should consider an issue which was not pleaded, briefed, argued or ruled upon in the court below; and if so, whether §2.02 infringes upon Appellant Dr. Rogers' First Amendment rights of free speech and association.

V. Whether this Court should consider an issue which was not pleaded, briefed, argued, or ruled upon in the court below and which was not raised in Appellant's Jurisdictional Statement; and if so, whether §2.02 conflicts with §1 of the Sherman Anti-trust Act such as to be invalid under the Supremacy Clause.

Statute Involved

The court below declared that §2.02 of the Texas Optometry Act, Article 4552 of the Revised Civil Statutes of Texas, was constitutional. The statute reads as follows:

> Article 4552, §2.02. To be qualified for appointment as a member of the [Texas Optometry] board, a person must be a licensed optometrist who has been a resident of this state actually engaged in the practice of optometry in this state for the period of five years immediately preceding his appointment. A person is disqualified from appointment to the board if he is a member of the faculty of any college of optometry, if he is an agent of any wholesale optical company, or if he has a financial interest in any such college or company. *At all times there shall be a minimum of two-thirds of the board who are members of a state optometric assocation which is recognized by and affiliated with the American Optometric Association.*

Statement of the Case

On August 25, 1975, Appellant, Dr. Rogers, who is a member of the Texas Optometry Board, brought this case against the remaining five members of the Texas Optometry Board. In his suit, Dr. Rogers challenged §2.02 and various other sections of the Texas Optometry Act as being unconstitutional and sought to enjoin their enforcement. Section 2.02, which is the statute at issue in this appeal, was challenged as being an arbitrary classification in violation of Dr. Rogers' Fourteenth Amendment rights to equal protection and due process. A three-judge court was convened to consider this case.

On June 11, 1976, W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter intervened and asserted that §2.02 violated Senior Citizens' First Amendment rights. Mr. Dickinson and his association will hereinafter be referred to as "Senior Citizens".

On September 13, 1976, the Texas Optometric Association, Inc., intervened in support of the Texas Optometry Board members and in support of the constitutionality of §2.02.

On October 27, 1977, the three-judge court entered its final judgment holding that §2.02 does not violate the First or the Fourteenth Amendments of the United States Constitution and denied injunctive relief. From this holding Dr. Rogers and Senior Citizens have appealed.

Summary of Argument

I. *Equal Protection.* The three-judge court below was correct in holding that §2.02, the provision of the Texas Optometry Act which requires that four of the six members of the Texas Optometry Board belong to the Texas Optometric Association (TOA), does not violate Dr. Rogers' constitutional right to equal protection. The Court properly applied the rational basis test which dictates that where the Legislature could have had a rational basis for creating a classification in matters of economic regulation, the courts will defer to the legislative determination and allow the statute to stand. The lower court concluded that there were several rational reasons for §2.02. These rational reasons were as follows:

1. That TOA members are more likely than non-TOA members to be economically independent and therefore less likely to be subject to economic pressures in decision making;

2. That TOA members are more likely than non-TOA members to emphasize and encourage the highest quality of eye care within the optometric profession; and

3. That the history of optometry in Texas indicates that TOA members are more likely than non-TOA members to enforce the Texas Optometry law.

While it is only necessary to show that the Legislature might have had these rational reasons for enacting §2.02, there is strong evidence that the Legislature was *actually aware* of these rational bases for §2.02.

Having determined that §2.02 did have a rational basis, the lower court correctly determined that §2.02 was not unconstitutional on equal protection grounds.

II. *Due Process*

A. *Substantive due process.* The court below correctly determined that §2.02 does not violate Dr. Rogers' right to substantive due process. The court properly determined that a rational basis analysis rather than an irrebutable presumption analysis would govern the constitutionality of §2.02. Furthermore, the court determined that even if an irrebutable presumption analysis were applied, §2.02 does not conclusively and irrebutably deny a board seat to non-TOA members. This is graphically demonstrated by the fact that the appellant Dr. Rogers, not a TOA member, is currently on the Texas Optometry Board and has been on the board for more than 20 years. Furthermore, the fact that Dr. Rogers is on the board indicates that he has suffered no harm from such alleged irrebutable presumption, and therefore lacks standing to assert that objection.

B. *Procedural due process.* The court below correctly overruled Dr. Rogers' procedural due process contention that TOA members are inherently biased and that §2.02 is therefore unconstitutional on procedural due process grounds. Dr. Rogers is incorrect in asserting that every optometrist who belongs to TOA must be presumed biased and that §2.02 therefore creates an inherently biased board. Bias cannot be constructively presumed. Instead, it must be actually proven on a case-by-case basis. This lawsuit did not arise out of a specific

disciplinary proceeding where the actual parties are known and where the nature of the charges is known. Consequently, the elements necessary to determine actual bias are not present in this lawsuit. Dr. Rogers alleges that §2.02 is unconstitutional because there is the possibility of bias in some future case where the parties and charges are presently unknown. The three-judge court below correctly concluded that §2.02 should not be struck down merely because there *might* be bias in some future case. Section 2.02 does not violate Dr. Rogers' procedural due process rights.

III. *Free Speech and Association*

A. *Senior Citizens' rights to commercial free speech.* Appellant Senior Citizens asserts that §2.02 violates its First Amendment rights to receive price information through advertising in that §2.02 places four members on the Texas Optometry Board who belong to an association that historically supported the statutory ban on price advertising. In the court below, Senior Citizens argued that as a result of §2.02, the Optometry Board was more likely to enforce state laws banning price advertising and that therefore §2.02 itself impaired Senior Citizen's right to receive advertising information. The three-judge court properly concluded that this assertion was mooted when the statutory ban on price advertising was declared unconstitutional and when the board members were enjoined from enforcing that statute.

B. *Dr. Rogers' rights to free speech and association.* Dr. Rogers raises for the first time in his jurisdictional statement the assertion that *his* First Amendment rights

of speech and association are impaired by §2.02. Since this issue was not pleaded, briefed or argued in the court below, and since evidence was not taken regarding this issue, this Court should decline to consider this new issue.

However, even if this Court should decide to consider this issue, §2.02 does not unconstitutionally violate Dr. Rogers' rights to commercial free speech. Section 2.02 establishes the membership qualifications of the Texas Optometry Board. It does not prohibit advertising or in any other way limit commercial free speech. Dr. Rogers argues that his First Amendment rights of commercial free speech are violated because if he joins TOA, he will be forced to abdicate his right to advertise. This is incorrect. TOA does not limit advertising by its members. It is true that in pre-*Bates* days TOA did discourage advertising in much the same way that professional associations of lawyers, M.D.'s, and architects did. However, TOA no longer limits advertising by its members. Consequently, Dr. Rogers' assertion that he would be forced to abdicate his right to advertise if he joined TOA is incorrect.

Dr. Rogers further asserts that §2.02 deprives him of the opportunity to be a member of the "majority" of the board unless he joins TOA, and that therefore, §2.02 unconstitutionally infringes on his right of association. This, also, is incorrect. It is important to note that §2.02 does not in any way deprive Dr. Rogers of the right to serve on the Optometry Board. In fact, Dr. Rogers is on the board and has been for 20 years. Dr. Rogers only asserts that he is deprived of the right to be a member of

the theoretical "majority" of the board. This assertion is highly artificial. The Optometry Board is composed of six individuals, each obligated to vote their conscience with the best interest of the state in mind. As a result, the "majority" varies from vote to vote and issue to issue. Dr. Rogers has himself been a member of the majority of the board on many occasions. Dr. Rogers' assertion that §2.02 prevents him from being a member of a theoretical majority is therefore highly artificial. Dr. Rogers argues that §2.02 should be declared unconstitutional because in order to avoid this theoretical harm, he must allegedly sacrifice his right not to associate with TOA. Appellee urges that the harm alleged is intangible and highly theoretical and that any resulting infringement on Dr. Rogers' associational rights, is not substantial enough to constitutionally invalidate §2.02.

C. *Recent FTC Rules.* On May 24, 1978, the FTC promulgated rules which prohibit any person, including state officials, from limiting in any way the dissemination of information concerning optometric goods or services. The rules further prohibit any professional association from preventing its members from advertising. With the enactment of these regulations, any First Amendment commercial free speech objections raised by Dr. Rogers or Senior Citizens are mooted. Under the regulations, even if the Texas Optometry Board wished to restrict advertising, they would be unable to do so. Consequently, the composition of the board is absolutely irrelevant to whether or not commercial free speech is restricted.

IV. *Supremacy Clause/Sherman Anti-Trust argument.* In its brief on the merits, Senior Citizens raises an issue which was not raised in the court below or in Appellant's

jurisdictional statement to this Court. Appellant asserts that §2.02, which establishes qualifications for membership on the state Optometry Board, conflicts with §1 of the Sherman Anti-Trust Act which prohibits private restraints of trade. Senior Citizens argues that §2.02 is therefore invalid under the Supremacy Clause. In point of fact, there is no conflict between these statutes and there is no Supremacy Clause question raised. Since this issue has never before been raised in this lawsuit and since this new anti-trust issue bears little relationship to the constitutional question presently before this Court, this new issue would be most properly considered in a separate lawsuit. This Court should refuse to consider this new and unrelated argument.

Argument

I. THE THREE-JUDGE FEDERAL COURT CORRECTLY HELD THAT §2.02 OF THE TEXAS OPTOMETRY ACT HAS A RATIONAL BASIS AND THEREFORE DOES NOT DEPRIVE APPELLANT DR. ROGERS OF EQUAL PROTECTION OF THE LAWS.

A. *Findings in the Court Below.* In the court below, Dr. Rogers challenged the constitutionality of §2.02, alleging that it created an arbitrary classification of optometrists and thereby deprived him of equal protection under the laws as guaranteed by the 14th Amendment.

The three-judge court below correctly determined that the classification created by §2.02 was founded on a rational basis and therefore does not violate the equal protection clause. Citing *New Orleans v. Dukes,* 427 U.S. 297 (1976), the court noted that when local economic regulation is challenged as violating the equal protection clause, the court shall defer to legislative determination. The court correctly stated that a statutory determination will not be set aside if any state of facts might be conceived to justify it, *McGowan v. Maryland,* 366 U.S. 420 (1961), and that the burden is on the one attacking the statute to negative every conceivable basis which might support it. *Madden v. Kentucky,* 309 U.S. 83 (1940).

Applying these standards, the three-judge court determined that §2.02 was founded on a rational basis, specifically mentioning three rational reasons for the legislative requirement that the majority of the Optometry Board be composed of TOA members.

(1) TOA members are more likely to be economically independent than non-TOA members.

(2) TOA members have a greater likelihood of emphasizing the highest quality of eye care, as compared to non-TOA members; and

(3) TOA members are more prone to enforce the Texas Optometry Act than non-TOA members.

Having determined that the legislature might have had these rational reasons for enacting §2.02, the court properly deferred to the legislature and held §2.02 constitutional.[1] *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955).

B. *Analysis of the rational reasons for §2.02.*

1. *Professional vs. commercial optometry.* Preparatory to a discussion of the rationale for the statute, it would be helpful to briefly discuss the difference between "professional optometry" and "commercial optometry." Their general meaning is set forth in the deposition of Dr. James J. Riley, past president of TOA. (Appendix Vol. III, pp.187-199).

Generally, "professional" optometry includes those practitioners who are independent and whose historical emphasis has been high quality eye care. More specifically, "professional" optometry embodies a number of concepts which go beyond the minimum requirements of the

[1]Appellant Dr. Rogers has attempted to rebut these rational bases by arguing the credibility and weight of the evidence presented in the court below. Dr. Rogers fails to recognize that the weight of the evidence presented at trial is not the controlling issue in a rational basis analysis. The issue is whether or not there is *any set of facts* the legislature *might* have relied on in enacting the statute in question. *McGowan v. Maryland* 366 U.S. 420 (1961). The evidence presented in this case overwhelmingly establishes that the legislature not only might have had rational bases for enacting §2.02, but that the legislature was *actually aware* of the rational bases cited by the court.

law. These characteristics include: economic independence from outside control by opticians or department stores, a greater emphasis on continuing education, a greater emphasis on sufficient length of examination time, examination by appointment rather than a wait-in-line-method, gaining patients by professional reputation, and no direct or indirect tie-ins with opticians. (Dr. Riley, A-III, 187-193). *The membership of the Texas Optometric Association is comprised solely of professional optometrists.* (Dr. Riley, A-III, 203).

In contrast, "commercial" optometry includes the optometrists associated with the optical chains such as Texas State Optical (TSO) and Lee Optical. "Commercial" optometry is characterized by a particular mode of practice which emphasizes volume, speed and trade name practice. It is further characterized by: influence of the optometrist by outside interests; tie-ins with opticians; employment or partnership contracts that inhibit professional independence and professional judgment; high speed examinations; high volume of examinations; less emphasis on continuing education; and less emphasis on law enforcement of optometry statutes.[2] The Texas Association of Optometrists (TAO)[3] is comprised mostly

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[2]Another distinction which at one time existed but which is no longer a distinguishing factor centers around advertising. For years professional optometrists, like professional M.D.'s and attorneys, opposed the use of advertising by professionals. However, with this Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), professionals in optometry have changed with the times and no longer prohibit advertising. The TOA bylaws were recently amended to reflect this change. (See affidavit at page 57 of the Appendix to this brief.) Therefore, the advertising/non-advertising distinction no longer distinguishes professional optometrists from commercial optometrists.

[3]Not to be confused with T.O.A., Appellee herein.

of optometrists in commercial optometry, although a few professional optometrists are members of both TOA and TAO. (Dr. Riley, A-III, 193-199).

With this understanding of the difference between commercial and professional optometrists, and with the understanding that TOA is comprised solely of professional optometrists, it is appropriate to proceed with an analysis of the rational reasons for §2.02.

2. *The first rational basis is that TOA members are more likely than non-TOA members to be economically independent.* The first rational basis for §2.02 centers around economic independence. Obviously, there is a legitimate state interest in having Optometry Board members who are "their own boss" and who are not dominated or controlled by others. The danger of a lack of economic independence increases significantly when a board member has financial ties to opticians which may preclude his economic independence and which may interfere with his enforcement of the law as a board member.

One evil that the Legislature sought to avoid in §2.02 was domination of the board by owners of opticianries over optometrists who were employees of opticians or who were controlled by opticians through various financial ties. These types of control (and the dangers inherent in them) were in fact communicated to the members of the legislature in 1969 by TOA optometrists who were from the home districts of the legislators. (Dr. Riley, A-III, 237, 247-252).

The Legislature justifiably assumed that one who was employed and controlled by another would be reluctant

to "buck his boss" when it comes to enforcing the Optometry Act or voting a certain way as a member of the Optometry Board.

a. *The McGuire contract.* The lack of economic independence and the potential for domination of a Board member by opticians is exemplified by Dr. Rogers' contract for sale of a partnership interest in a TSO office to Dr. Richard P. McGuire (A-I, 71-98). The "partnership" provisions of the McGuire contract provide:

(1) The optometrist must devote full-time to the practice; must be present every working day of the year except two weeks' vacation; must be there during the two weeks' vacation if there are no substitute personnel available.

(2) The firm of Rogers Brothers must be retained, at a fee of 4% of net cash, for advice and supervisory services of accounting, advertising, programming, window display, etc.

(3) The optometrist must abide by Rogers Brothers rules, regulations, and policies for the management of the office, including policies concerning examination of patients, progress examinations, re-examinations, and all other policies regarding contact lenses, transfer patients, patients from other TSO offices. Such rules are determined solely by Rogers Brothers.

(4) All inventory and supplies must be purchased from Rogers Brothers, including all optical material of every nature such as frames, lenses, contact lenses, all prescrip-

tion work, opthalmic supplies, refracting equipment, and other optical supplies.

(5) All optical laboratory work must be done and purchased from Rogers Brothers laboratories.

(6) The optometrist must terminate the use of the TSO name if the partnership terminates for any reason.

(7) Rogers Brothers can terminate the contract upon misconduct or breach of contract by the optometrist. Misconduct is defined as including "consistent and willful refusal to follow management policies and procedures after receipt of written notice setting forth such deficiencies."

(8) The resident optometrist must covenant not to compete within three miles for a 10 year period in the event of the partnership being dissolved (for reasons other than sale).

These controls exist if the optometrist and Dr. Rogers are *partners.* However, even in the event Dr. Rogers sells the *entire* local TSO office to the optometrist, very similar controls are imposed on the optometrist.[4] Bear in mind that these controls would exist even though the local optometrist would own the business and theoretically "be his own boss." Those controls provide that:

(1) Daily sales reports must be submitted to the Beaumont, Texas office of Dr. Rogers.

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[4]The control is so extensive that it was the basis of an anti-trust lawsuit by Dr. McGuire against Rogers Brothers. A certified copy of the federal court complaint is an exhibit in this case.

(2) The resident optometrist must purchase all optical material, frames, lenses, contact lenses, or prescription work, opthalmic supplies, refracting equipment, and other optical supplies from Rogers Brothers laboratory.

(3) The optometrist must abide by Rogers Brothers rules and policies covering the optometrist's hours of operation, personnel procedures, professional fees, and pricing of eyeglasses and other optical materials. Rogers Brothers controls and dictates policies covering examination of patients; progress examinations; re-examination; and all other policies including the care and continued care of contact lens patients and transfer patients from other TSO offices.

(4) Dr. Rogers can impose a $50 per day fine, or terminate the contract and prevent the use of the TSO name if the resident doctor fails to abide by Rogers Brothers rules and policies.

(5) The optometrist must purchase all his insurance including general liability, workman's compensation, professional liability, fire, hospitalization, and other casualty coverage from a broker designated by Rogers Brothers.

(6) The optometrist must use Rogers Brothers' prescription forms.

(7) The resident optometrist must not compete within certain areas for a period of 5 years from the date their relationship is terminated.

(8) The optometrist must be a member of Rogers Brothers pension plan and various benefit programs such as hospitalization insurance and disability insurance.

(9) The optometrist must participate in TSO advertising, prorata, in accordance with gross receipts. There is no ceiling on the dollar amount or percentage amount which must be contributed to TSO advertising other than the foregoing.

Various other kinds of economic controls and tie-ins are prevalent in commercial optometry. These other types encompass: leasing space or equipment to an optometrist who offices next door to the opticianry; referring patients from the optician to the optometrist; and contracts requiring exclusive use of laboratories.

Economic ties to opticians and/or contracts of this sort are common among commercial optometrists and are non-existant among professional optometrists. (Dr. Riley, A-III, 195). Based on this fact the Legislature might legitimately conclude that TOA members would be less likely to succumb to economic pressures and controls than commercial optometrists.

b. *Dr. Shannon's Testimony.* Dr. Robert Shannon, who was a former owner of the Lee Optical chain in Texas candidly admitted that when he was part owner of the chain, Lee Optical controlled the optometrists employed by him, top side and bottom. He further stated that if one of his Lee Optical optometrists had been a member of the state optometry board, his votes and actions would certainly have been constrained by the fear of being fired if he displeased the owners of Lee Optical.

"Q. If an optometrist who was in your employment at the time that you were part owner in Lee Optical were on

the Texas Optometry Board, would you expect that person to look out for the interest of Lee Optical?

A. You bet.

Q. If that person who was in your employment voted against what you considered to be the best interest of Lee Optical, what would you do about it?

A. I would have a very frank talk with him and try to advise him of what side of the bread he puts the butter on because, in essence, I am paying his salary.

Q. If he didn't eventually come around to what you considered was voting for the best interest of Lee Optical, what would you do; would you fire him?

A. I am sure I probably would, yes. . . . If I didn't fire him, I would make it very unpleasant for him so that he would terminate." (Dr. Shannon, A-II, 159).

The entire deposition of Dr. Shannon is repleat with examples of how optometrists who were with Lee Optical in Texas were under the complete control and dominance of the owners of the Lee Optical chain. Dr. Shannon's deposition exposes the hard facts upon which the 1969 Texas Legislature could have relied in requiring that four TOA members be on the Optometry Board.

Because nearly all commercial optometrists are employed by or affiliated with chains such as T.S.O. or Lee Optical, they are subject to direct or indirect economic pressure from the owner of such chains. T.O.A. members, on the other hand, do not work for

such chains, and therefore are more likely to be economically independent and free from such pressures.

c. *Federal judge/economic independence analogy.* A vivid analogy might easily be made between the requirements of the Texas Optometry Act and the constitutional requirement that all federal judges have life tenure. It cannot be said with certainty that a particular judge would be a better or worse judge if he did or did not have life tenure. However, it was the intent of the Constitution that federal judges be granted the utmost in economic independence in order that their judgments and enforcement of the law be free from dominance or control by the Congress, the President, or the electorate. By analogy, one of the primary purposes of the Optometry Board is to enforce the law. And, as in the case of federal judges, such enforcement can best be accomplished in an atmosphere of economic independence where there is minimal chance of economic repercussions for unpopular decisions and strict enforcement. (Dr. Riley, A-III, 251-254).

In the light of the economic controls traditionally exerted on commercial optometrists, the Legislature might rationally conclude that TOA members are more likely than the non-TOA members to be economically independent and free from outside control. As such, the Legislature had a rational basis for enacting §2.02.

3. *The second rational basis is that TOA members are more likely than non-TOA members to emphasize the highest quality eye care.* There is concrete evidence of legislative awareness of the need for board members whose primary concern is *quality eye care* rather than

high volume and high speed eye care (Dr. Riley, A-III, 237, 241, 249).

Because of the track record of TOA, it is reasonable to believe that TOA members are more likely (as compared to non-TOA members) to emphasize and encourage higher standards and higher quality in eye care. The reasons for this greater probability are summarized in the deposition testimony of Dr. James J. Riley (a former president of TOA), Dr. Nelson Waldman (a former state board member and former TOA president), Dr. Robert Shannon (a former commercialist and owner of the Lee Optical chain), and Dr. Chester Pheiffer (Dean of the College of Optometry at the University of Houston). Their testimony can be summarized as follows:

a. *Length of time for examinations.* TOA members emphasize allowing a sufficient length of time for examinations, whereas the emphasis of the commercial optometrists is on greater volume and speed which nurtures lower quality eye care (Dr. Riley, A-III, 188, 194).

TOA members emphasize more thorough and lengthy examinations for the benefit of the patient. The basic competence requirement takes at least 20 and probably 30 minutes. But the average TOA optometrist probably spends 30 minutes to 45 minutes on the routine patient (Dr. Waldman, deposition pp. 43-44, not in appendix). In contrast, commercial optometry has historically emphasized speed and volume, resulting in greater danger of the examinations being less thorough and accurate (Dr. Riley, A-III, 194). In fact, there are examples where the examinations have been much shorter, sometimes as short as eight or ten minutes (Dr. Shannon, A-II, 122-126).

b. *Appointment rather than waiting in line.* TOA members practice by appointment rather than by a wait-in-line method utilized by commercial optometry (Dr. Shannon, A-II, 106-107). The appointment method encourages a more professional examination since it does not place the optometrist under the gun of losing patients who are waiting in the lobby. The professional optometrist is more free to allocate sufficient time for examinations since they are by appointment; and if an unanticipated problem arises, he is in a less perilous situation if he spills over into the next appointment or asks the patient to come back (Dr. Riley, A-III, 188, 194).

In contrast, in a commercial practice, the no-appointment/wait-in-line method encourages and forces the optometrist to speed up an examination for fear of losing patients waiting in line in the lobby (Dr. Riley, A-III, 194).

c. *Dangers from pressures of high volume.* TOA members are not under pressure of high volume in contrast to commercial optometrists. When optometrists are under pressure to turn out high volumes of patients, there is a tendency for shortcutting or eliminating important aspects of the examination. This can be very harmful to the patient in many ways.

This proposition was covered in great detail in the deposition of Dr. Nelson Waldman, who was formerly chairman of the Optometry Board and whose opinion is based on numerous investigations and hearings on basic competence violations by optometrists. Dr. Waldman in his deposition thoroughly discussed the steps in an optometric exam, in layman's terms, and pointed out the

dangers of exams done in haste for high volume purposes (Dr. Waldman, A-IV, 309-312, deposition 16-30).

d. *No "locked-in" source of supply.* TOA members are not "locked-in" to one single source of supply or one single laboratory (Dr. Riley, A-III, 190). The examining optometrist loses control over quality of lens fabrication when he cannot threaten to quit his laboratory because of poor quality.

A concrete written example of the dangers of a locked-in source of supply is exemplified by the February 15, 1961 letter from Dr. C. T. Shropshire to Lee Optical local offices. Lee instructed their employee optometrists *not* to give prescriptions for certain types of lenses, even if needed or requested by the patient. (Dr. Riley, A-III, 241-246).

e. *Verification of lenses.* TOA members are more likely to verify lenses after they return from the laboratory because they are their own boss and are under less time pressure (Dr. Waldman, A-IV, 308-312; Dr. Shannon, A-II, 109-111). Dr. Shannon testified that a correct examination and a correct prescription is useless if the lens prescription is filled incorrectly.

f. *Properly equipped offices.* TOA membership is a general assurance of properly equipped offices and adherence to the provisions set forth in the TOA code of practice. (Dr. Riley, A-III, 188).

g. *Continuing education.* TOA membership meant and still does mean emphasis on continuing education. TOA fought hard for the creation of the Optometry College at the University of Houston (Dr. Riley, A-III, 188) and

was primarily responsible for the passage of a bill to make continuing education mandatory for license renewal (Dr. Riley, A-III, 191-192). Before the passage of the continuing education statute, TOA was active in continuing educational seminars in regional and statewide conventions (Dr. Riley, A-III, 190-191).

In contrast, it was the testimony of Dr. Rogers that he personally opposed the continuing education law and that it was his intention to encourage the Texas Association of Optometrists (primarily composed of commercial optometrists) to challenge the statute in court as being unconstitutional. (Dr. Rogers, deposition p. 247, Dr. Riley, A-III, 198-199). Sure enough, several weeks after Dr. Rogers made this statement during his deposition, the Texas Association of Optometrists filed suit to challenge the constitutionality of that statute.

h. *Strong doctor/patient relationship.* TOA members are more apt to maintain quality care because of a strong doctor/patient relationship unlike commercial optometrists (Dr. Riley, A-III, 188-189). TOA members traditionally emphasize a close professional relationship between doctor and patient, while in commercial optometry, it is rare for a patient to even know the name of the particualr optometrist attending him (Dr. Shannon, A-II, 112-113). When there is no strong doctor/patient relationship and the doctor's identity remains relatively anonymous, the optometrist logically feels less responsible and less fearful of repercussions from the patient's dissatisfaction.

In conclusion, TOA optometrists, as opposed to commercial optometrists, place great emphasis on a strong doctor/patient relationship. Unlike commercial optometrists,

they emphasize the importance of allowing adequate time for examinations and consequently utilize appointment scheduling rather than wait-in-line, high volume, high speed practice. TOA members, unlike commercialists, are not locked in to any source of supply of optical lenses and emphasize lens verification. Consequently, since TOA members emphasize high quality eye care in their own practice, they are more likely to emphasize and encourage the highest quality eye care if they are appointed members of the Optometry Board. As such the Legislature had a rational basis for enacting §2.02.

4. *The third rational basis is that TOA members are more likely than non-TOA members to enforce the Texas Optometry Law.* Historically, TOA was responsible for the Legislature's adoption of the first Optometry Act in the early 1900's; and TOA has been heavily involved in legislative efforts to up-grade the quality of eye care (Dr. Riley, A-III, 190-191).

In contrast, commercial segments of optometry, represented primarily by Lee Optical and Texas State Optical, have been on the other side of the coin in the courthouse for years, unsuccessfully contesting the validity and constitutionality of board rules, state statutes, and board enforcement of those rules and statutes. A summary of some fourteen lawsuits in which commercialists have challenged the Texas optometry laws is contained in the Appendix to this brief at page 54.

These lawsuits, including a recent suit to declare the continuing education statute unconstitutional, show a consistent history of commercial optometry's repeated attempts to stymie board enforcement of the optometry laws. From this history, the legislature might well have

concluded that TOA members were more likely than commercial optometrists to enforce the Texas Optometry Act.

The legislature's rationale that TOA members are more likely to enforce the Texas optometry law than commercial optometrists is further buttressed by the fact that many of the commercialists have been philosophically and actively opposed to the professional responsibility rule of the Texas Optometry Act (§5.13). That rule prohibits fee splitting with laymen and other optometrists; it prohibits gross absenteeism by the optometrist; and it prevents deception with regard to listing of the optometrist's name at offices at which he does not actually practice. Commercial optometry's opposition to this rule is evidenced by their repeated efforts to destroy it by litigation (see list of cases in the Appendix to this brief at p. 54) and by attempts to have the rule repealed.

One of the most significant examples of commercial optometry's opposition to the Texas optometry law occurred in 1968 immediately prior to the enactment of the current law. At that time, the Texas State Board of Examiners in Optometry was the agency charged with regulating optometry in Texas. That board, unlike the current optometry board, had rule making powers as well as enforcement powers. One of the rules which the board of examiners had adopted was a professional responsibility rule substantially similar to the current §5.13, (Dr. Riley, A-III, 207-208).

In 1967 Dr. Rogers sat on the board of examiners. Also, two TOA optometrists sat on the board, and there were two vacancies. Governor John Connally appointed two commercial optometrists, Dr. Dan Geller and Dr. C.

T. Shropshire, to fill the vacant positions. With these appointments, commercial optometrists held a majority on the Texas Optometry Board (Dr. Riley, A-III, 205).

In 1968, at a board meeting in which a quorum was not present, the commercial optometrists purported to elect Dr. Rogers president of the board. At that same meeting, also without the presence of a quorum, the three commercial optometrists purported to repeal the professional responsibility rule and sent letters to all optometrists in the state announcing that the rule had been repealed. (Dr. Riley, A-III, 206, Dr. Rogers' Second Deposition pp. 75-80).

The Texas legislature responded swiftly. In 1968, the Texas Senate refused to confirm Dr. Geller and Dr. Shropshire to the Board of Examiners. In 1969, the legislature abolished the Board of Examiners, replacing it with the present Optometry Board. This new board was denied all rule-making and rule-changing powers and was assigned instead the task of enforcing optometry law as passed by the Legislature. At the same time, the Legislature enacted the professional responsibility rule into law. (Dr. Riley, A-III, 216, Tex.Rev.Civ.Stat., Art. 4552 §6.01, §2.01, §2.14, §5.13).

This particular episode, perhaps more than any other, evidences the Legislative awareness that commercial optometry was hostile toward enforcement of Texas Optometry law. (Dr. Riley, A-III, 236-237). The Legislature's action in requiring that at least four of the members of the new board be TOA members was rationally founded on the Legislature's belief that TOA members were more likely than commercial optometrists to enforce the optometry law in Texas.

On the basis of the evidence presented to the court of the history of commercial optometry's opposition to the Texas Optometry Law and of TOA's support of the Texas Optometry Law, the court correctly concluded that the Legislature could have determined that TOA members are more likely to enforce the optometry laws as written by the Legislature. As such, the Legislature had a rational basis for enacting §2.02.

5. *The Legislature was actually aware of these rational bases for §2.02.* The foregoing rationales for §2.02 in the 1969 Optometry Act were not "created" for this lawsuit. Quite the contrary. All of these arguments were asserted by members of TOA in the 1968 legislative election and in the 1968 Texas Senate battle over the appointments of Dr. Dan Geller and Dr. C. T. Shropshire to the Board of Examiners. Drs. Geller and Shropshire (both associated with Lee Optical) had been appointed by Governor John Connally in late 1967. TOA members fought their confirmation with the facts and arguments set forth earlier in this brief. This information was actually communicated to the members of the Texas Senate. This was presumably one of the reasons why neither optometrist was confirmed by the Senate (Dr. Riley, A-III, 210-213).

These arguments were also communicated to the candidates in the Texas House and Senate legislative races in 1968. (Dr. Riley, A-III, 210). Lastly, TOA members all over the state of Texas argued these facts successfully with the members of the Texas House and Senate during the passage of the 1969 Optometry Act (Dr. Riley, A-III, 235-254). Part and parcel of these arguments to the Legislature was the fact that commercial optometrists were not members of the Texas Optometric Association.

On the basis of the foregoing analysis, the lower court was justified in finding that §2.02 was founded on a rational basis.

II. THE THREE-JUDGE FEDERAL COURT CORRECTLY HELD THAT §2.02 DOES NOT DEPRIVE APPELLANT DR. ROGERS OF DUE PROCESS OF LAW.

A. *Section §2.02 is not invalid under the theory of substantive due process.* Dr. Rogers asserts that §2.02 is unconstitutional under the doctrine of substantive due process in that §2.02 allegedly creates an irrebuttable presumption that non-TOA members are less qualified to serve on the board than TOA members.

The court below properly rejected such reasoning, noting that the cases cited as supporting authority by Dr. Rogers all involved fundamental rights which are more stringently protected than non-fundamental rights. The court held that in this case, as in other non-fundamental rights cases which involve state regulation of economic matters, the rational basis test of *New Orleans v. Dukes,* supra, and *Williamson v. Lee Optical,* supra, is to be applied. Applying this rational basis test, the court found that the Legislature clearly had a rational basis for enacting §2.02.

However, Dr. Rogers argues that his "fundamental right" to serve on the majority of the Optometry Board is deprived, and therefore, an irrebuttable presumption analysis is appropriate. Dr. Rogers' argument is erroneous for several reasons. First, there is no consititutional right to be in the majority on any governing body. If this were so, then many government boards in ex-

istence would be unconstitutional, and an Optometry Board of almost any composition would be unconstitutional. For example, an Optometry Board composed of four commercial optometrists and two professional optometrists would be unconsititutional in that the professional optometrists would be in the minority. A board composed of four optometrists and two consumers would be unconstitutional in that the consumers would be in the minority. Dr. Rogers fails to recognize that there is no constitutional right to be in the majority on a board. Since fundamental rights are not involved in this case, an irrebutable presumption analysis is inappropriate. *Weinberger v. Salfi, 422 U.S. 749 (1975).*

Dr. Rogers' irrebuttable presumption analysis is furthermore inappropriate in that, unlike any other irrebuttable presumption case, §2.02 does not irrebuttably prevent any person from sitting on the board. While four of the six board members must belong to TOA, non-TOA members may fill the other seats on the board. As the court below noted, §2.02 "does not conclusively deny any person a board seat." 438 F. Supp. 428, 433. In other words, §2.02 does not irrebuttably presume that a non-TOA member is less qualified to serve on the board. The fact that a non-TOA member may still serve on the board is dramatically illustrated by the fact that Plaintiff Dr. Rogers, a non-TOA member, is himself currently serving on the Board and has been for over 20 years. Section 2.02 is not unconstitutional on the basis of a substantive due process/irrebuttable presumption analysis.

However, assuming arguendo that §2.02 is subject to a substantive due process argument, Dr. Rogers lacks the requisite standing to raise the issue. Dr. Rogers currently sits on the Texas Optometry Board and did at the time

this suit was filed. Consequently, he has suffered no harm from any irrebuttable presumption §2.02 might raise. Since Dr. Rogers has suffered no direct injury from §2.02, and since it is clear that §2.02 is constitutional as applied to him, Dr. Rogers lacks standing to assert an irrebuttable presumption objection to §2.02. *U.S. v. Raines* 362 U.S. 17, 21-24 (1060).

B. *Section 2.02 does not violate Dr. Rogers' right to procedural due process.* Dr. Rogers next asserts that §2.02 is invalid under a theory of procedural due process, alleging that the Optometry Board under §2.02 is inherently biased. Dr. Rogers relies heavily on the reasoning in *Wall v. American Optometric Association, Inc.* N. D. Georgia 1974 (3-Judge Court) 379 F. Supp. 175, aff'd. 419 U.S. 888 (1974) and *Gibson v. Berryhill,* 411 U.S. 564 (1972). He asserts that because the board has a majority of TOA members, the board is inherently biased against non-TOA members, and therefore §2.02 is unconstitutional as depriving Dr. Rogers of procedural due process.

The lower court correctly overruled Dr. Rogers' contention, citing the language of *Wall* that, "there is no federal constitutional requirement to the effect that legislators and rule makers must be free of bias or interest." 438 F. Supp. 428. The three-judge court further pointed our that the case at bar is readily distinguishable from both *Wall* and *Gibson* in that:

(1) Those cases were brought *after* the optometry boards in question had brought charges against the optometrist plaintiffs, and therefore, they speak only to the due process issues which surround disciplinary adjudications.

(2) In those cases the boards had rule-making power which they had exercised, while in the instant case the Texas board has no rule-making power to enforce what the Legislature has mandated, and

(3) In *Wall* and *Gibson* all members of those boards were members of the state optometric association, while in the case at bar one-third of the board is composed of non-TOA members. 438 F. Supp. 433.

The lower court was correct in rejecting Dr. Rogers' procedural due process challenge. The *Wall* and *Gibson* cases heavily relied on by Dr. Rogers involved a court determination of *actual bias* of particular board members who were seeking to enforce a specific law against other optometrists. Those cases were brought after disciplinary proceedings had been initiated. Therefore, it was possible for the courts in those cases to make a factual determination that members of the Optometry Board in question were in fact biased as to those particular defendants in that particular proceeding.

In stark contrast, the case at bar does not arise out of a disciplinary proceeding. No question is raised as to whether the Texas Optometry Board is biased as to any particular defendant or in any particular case. Dr. Rogers is asserting that §2.02 makes the Texas Optometry Board unconstitutionally biased toward *all* non-TOA members and in *all* cases. Dr. Rogers asserts that the TOA members of the board must be constructively presumed to be biased and that it must be constructively presumed that their bias is so pronounced as to render every action taken by the board invalid. Dr. Rogers' reasoning is flawed in several significant ways.

1. *Bias must be proven on a case by case basis.* First, bias is not something that is constructively presumed. Bias must be proven in any particular case on a case by case, person by person basis. Bias in any particular case is a question of fact which must be determined based upon the facts of the individual case. Since the case at bar does not arise out of a particular proceeding where the relevant facts are known, the court below properly refrained from determining whether or not the Optometry Board was biased.[5]

In any hearing to determine the bias of a disciplinary body, it would be necessary to determine (1) the nature of the disciplinary action sought, (2) the identity of the particular person being disciplined, and (3) the biases of the individual board members and of the board as a whole.

All three of these elements were fixed and known in the *Wall* and *Gibson* cases upon which the Plaintiff relies.

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[5]It should be particularly noted that this case did *not* arise out of a disciplinary proceeding. Dr. Rogers, however, asserts that in the future the Texas Optometry Board is likely to enforce the Texas Optometry Law and, therefore, is likely to bring disciplinary proceedings at some time in the future against Dr. Rogers. First, there is no action pending against Dr. Rogers, and any assertion that there will be in the future is pure speculation. Secondly, even if future actions were brought against Dr. Rogers, the nature of the charges against him and the individual identity of the board members at that time is not yet established. Without such information, it would be impossible to make a factual determination of bias in advance. As the court below noted, if in the future the board does bring an action against Dr. Rogers and he does feel the board is biased against him, he is free to assert that contention at that time. At that time evidence could be taken as to the actual bias of known board members toward a known defendant during a proceeding in which the nature of the case is also known. This Court is not the appropriate forum to hear such arguments at this time since the evidence gathered for this cause has focused upon the constitutional legal issues rather than upon the factual question of bias in any particular case.

None of these elements is fixed and known in the case at bar. Nevertheless, Dr. Rogers asks this Court to declare §2.02 unconstitutional on the basis that in some unspecified case in the future in which the nature of the case and the parties are not yet known, and in which the identities of the Board members are also unknown, a TOA dominated board might be biased toward the parties. This Court should not declare §2.02 unconstitutional on such a basis. Because this case has not arisen out of a disciplinary proceeding, these elements which are necessary for a fair determination of bias are not yet fixed and therefore, cannot be fairly balanced by the Court. Such facts can only be fixed after a particular disciplinary proceeding has been brought and after the particular parties in question are known. Therefore, the court below properly concluded that a bias analysis was not appropriate unless it arose out of a particular disciplinary proceeding where the parties and charges are known.

2. *Bias cannot be constructively presumed based solely on membership in a professional association.* Although bias must ordinarily be proven on a case-by-case, person-by-person basis, Dr. Rogers argues that the requirement that four members of the Texas Optometry Board belong to the TOA constitutes such inherent bias as to make the board unconstitutional in all cases. This argument is based upon the assumption that all TOA members are biased against all non-TOA members. This assumption is erroneous. TOA is composed of hundreds of individuals, and each individual is different. While there may be some TOA members who carry a bias toward non-TOA members, it can be stated with great certainty that there are hundreds of TOA members who have no such bias. Similarly, while there are some non-TOA members who have biases against TOA members, the vast majority probably do not. Bias varies from individual to individual, and an

individual may not automatically be deemed biased simply because he belongs to a particular organization.

Bias should not be constitutionally "presumed" based merely upon an individual's affiliation with a particular organization. It should be noted that in both the *Wall* and *Berryhill* cases, on which Plaintiffs rely, bias was not assumed and was not an automatic result of the organizational ties of the board members. In the *Wall* case it was especially clear that organizational affiliations did not render the Alabama Optometry Board inherently biased. The Court concluded that the board's action in adopting a rule against corporate practice was valid and not subject to attack for pecuniary bias, even though every member of the board belonged to the Alabama Optometric Association. The Court's objection to the board make-up went only to the board's bias, *proven at trial,* in enforcing the rule. Logically, if the organizational affiliations had been sufficient to make the Alabama Board inherently biased as a matter of law, all actions of the Optometry Board would have been unconstitutional including the adoption of the corporate practice rules. However, the Court recognized that mere membership in a professional organization is not enough to inherently render a person biased. Such bias must be proven as to each particular individual and as to each particular proceeding. Membership in an organization does not automatically render all members biased against all nonmembers in all proceedings.

However, if this Court were to accept Dr. Rogers' argument that membership affiliation or non-affiliation alone is enough to determine bias, then it could effectively mean that any board, whatever its make-up, would be unconstitutional because of bias. For example, where does this argument lead if the AOA affiliation require-

ment were invalidated and the Governor continued to appoint four TOA members and two non-TOA members to the Board? Under Dr. Rogers' theory, the board would still be unconstitutional because the majority TOA members must be presumed biased. Or the Governor might appoint four commercial optometrists who are not members of TOA and two professional optometrists who are members of TOA. Is the board's make-up then to be unconstitutional because there is a majority of commercial optometrists on the board and such majority is presumed inherently biased against professional optometry? The court below correctly determined that membership affiliation alone does not determine bias.

3. *Dr. Rogers' pecuniary bias argument is faulty.* Dr. Rogers has argued that the requirements that four members of the Texas Optometry Board belong to TOA creates a board that is inherently biased against non-TOA members for pecuniary reasons. Dr. Rogers argues that if the Texas Optometry Board ever revokes the license of a non-TOA member, then the TOA board members would be financially benefited because some of the patients who otherwise would have gone to the optometrist who was disciplined might now go to TOA optometrists. This reasoning is faulty for several reasons. First, there is no guarantee that the patients of this hypothetical optometrist would patronize TOA members as opposed to non-TOA members. They would be just as likely to patronize a non-TOA member. Secondly, even if some of the patients did patronize another TOA member, such patronage would be of no pecuniary benefit to the optometry board member since all TOA members are themselves in competition with one another, all being competing members within the same profession. Thirdly, Dr. Rogers' pecuniary bias argument does not speak to

whether or not TOA or non-TOA members should sit on the board. It speaks only to the question of whether or not one *optometrist* may sit in judgment of another optometrist. Any time one optometrist's license is revoked, other optometrists have one less competitor, and *all optometrists,* regardless of membership or non-membership in TOA, theoretically benefit. Consequently, if there is pecuniary bias inherent in the Optometry Board, such bias exists by virtue of the fact that the board members are optometrists, not by virtue of their being members or non-members of TOA. Dr. Rogers is challenging §2.02 for its TOA/non-TOA provisions, and therefore a pecuniary bias analysis is not appropriate to that challenge. Section 2.02 does not unconstitutionally create a board that is pecuniarily biased.

The court below correctly determined that bias must be determined on a case by case basis and that mere membership in the TOA does not render a board member inherently biased. The court below was correct in holding that §2.02 does not violate procedural due process

III. SECTION 2.02 IS NOT INVALID AS BEING VIOLATIVE OF THE FIRST AMENDMENT FREEDOMS OF SPEECH AND ASSOCIATION.

A. *Senior Citizen's First Amendment right to commercial information is not impaired by §2.02.* Appellant Senior Citizens originally challenged §2.02 as an unconstitutional infringement on their First Amendment right to consumer information. This challenge was based on the theory that a board with four TOA members was more likely to enforce the anti-advertising laws then in effect, and thereby more likely to deprive them of their rights.

Such claim, however, is now moot. At the time this suit was brought by Senior Citizens, §5.09 of the Optometry Act prohibited price advertising by optometrists. In this same lawsuit below, appellant Senior Citizens challenged that section as being an unconstitutional infringement on its First Amendment right to consumer information. In the light of this Court's decision in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), the three-judge court below determined that §5.09 is unconstitutional and enjoined its enforcement. No appeal has been taken from that part of the decision below.

After the court decision permitting price advertising by optometrists, the three-judge court below correctly determined that Senior Citizens' First Amendment challenge of §2.02 was mooted. The Optometry Board was enjoined from enforcing the prohibition on price advertising and as such the composition of the Optometry Board became irrelevant to Senior Citizens' First Amendment claims. *Under the law as it now stands, optometrists may price advertise and Senior Citizens is not deprived of its right to such information,*

However, by this appeal Senior Citizens urges that, despite the new status of the laws, Senior Citizens is still deprived of its First Amendment right to receive commercial information. Its reasoning follows these lines: Section 2.02 requires the Optometry Board to be composed of at least four TOA members. In the pre-*Bates* days, TOA members pressed to enforce the law that was then on the books prohibiting price advertising. Because TOA members enforced §5.09 in the days before it was declared invalid, Senior Citizens fears that the TOA members of the board might ignore the federal court order and might attempt to enforce §5.09 anyway, either directly or indirectly by harassment of advertising

optometrists. Senior Citizens argues that if the TOA board members do this it might have a chilling effect on the optometrists who advertise. Therefore, Senior Citizens might not receive all of the consumer information they might otherwise have received. Senior Citizens argues therefore, §2.02 is unconstitutional because it is an unwarranted infringement upon Senior Citizens' right to receive information.

This argument is erroneous for several reasons. First, the contention is based upon little more than speculation. Senior Citizens has not shown that it has suffered any actual harm from the composition of the Board, and it has not even shown that there is a likelihood of such harm. They have only asserted that *if* the board members choose to violate the court order concerning price advertising, then Senior Citizens *might* suffer harm. The harm asserted is too speculative to warrant declaring §2.02 unconstitutional.

Secondly, Senior Citizens' argument is based upon the speculative and erroneous assumption that the four TOA members on the board will disobey the lower court order or will otherwise seek to undermine the court's decision on price advertising. This assumption is clearly unwarranted. Members of the Optometry Board are sworn to uphold the law. To assume that they will do the contrary is to accuse the members of the board of violating their oaths of office. And to argue that the board itself is *unconstitutional* because the members thereof *might* not enforce the law they are sworn to enforce is, to say the least, extremely tenuous.

The Optometry Board has been permanently enjoined by court order from enforcing the ban on price advertising. If the board fails to obey, they are subject to

contempt proceedings. As such, Senior Citizens' right to receive price information is adequately protected.

However, Senior Citizens' rights have been afforded even greater protection by a recent FTC ruling.[6] That ruling provides that it is unlawful for any governmental body to restrict the advertising of *any* optometric information, not just price information. As a result, even if a government board did have a predisposition against advertising, they are now prohibited from restricting advertising in any way, direct or indirect. Consequently, the composition or alleged predisposition of the Optometry Board becomes irrelevant to whether or not advertising information is restricted.

The order of the court below authorizing price advertising and the recent FTC ruling prohibiting any limits on advertising by optometrists have totally mooted Senior Citizens' assertion. The composition of the Optometry Board does not serve to deprive Senior Citizens of their First Amendment right to commercial information.

B. *Dr. Rogers' First Amendment rights are not impaired by §2.02.*

1. *This issue was not raised or tried in the court below.* In his jurisdictional statement to this Court, Dr. Rogers for the first time raises the complaint that his First Amendment rights are violated by §2.02. Although

[6]Federal Register, Vol. 43, No. 107, p. 23992 at 24006-24008, (June 2, 1978), Trade Regulation Rules — Advertising of Opthalmic Goods and Services. For the convenience of the Court these rules have been reproduced in the appendix to this brief at page 60.

Senior Citizens has from its first entry into this lawsuit asserted that *their* First Amendment rights to consumer information may have been impaired by §2.02, Dr. Rogers did not assert in the court below that *his* First Amendment rights to free speech and association were impaired by §2.02. The first time Dr. Rogers raised this issue was in his jurisdictional statement to this Honorable Court. The issue was not pleaded, briefed or argued in the court below. Evidence was not taken on the issue, and the lower court's opinion did not address the issue. Consequently, this new issue is not properly before this Court and this Court should decline to consider it. *Singleton v. Wulff,* 428 U.S. 106 (1976).

a. *This issue was not pleaded in the lower court.* For the convenience of this Court the pleadings to the lower court have been reproduced in the appendix of this lawsuit at A-I, 8-16. The sections of Plaintiff's complaint dealing with §2.02 are contained on pages A-I, 9-11. While Plaintiff Dr. Rogers asserts in that complaint that §2.02 "deprives your plaintiff of constitutional equal protection and due process," the complaint at no time alleges that Dr. Rogers' First Amendment rights to free speech or association have been violated by §2.02. (A-I, 11). This issue was never pleaded or otherwise raised in the Court below.

b. *Evidence was not taken regarding this issue.* Because this issue was first raised with the filing of Plaintiff's Jurisdictional Statement in this Court, Defendants were never given an opportunity in the court below to discover and present evidence which might speak to this new issue. Consequently, the evidence necessary to fully and fairly decide this new issue is not now before this Court.

Although Plaintiff would rely on evidence that was gathered on other issues in this lawsuit, it would not be fair to decide this lawsuit based only on evidence which was gathered in support of other issues and which incompletely and tangentially speak to this new issue. If this new issue is to be tried via this lawsuit, Defendants should be given the opportunity to discover and present evidence relevant to the new issue. Consequently, it would not be appropriate for the Court to consider this new issue at this time.

c. *The issue was not briefed by the parties below.* Although the briefs below were voluminous, *not once* in more than 240 pages of briefing did Plaintiff Dr. Rogers assert that §2.02 violated his First Amendment rights. All of Plaintiff's briefing and all of Defendants' briefing centered around equal protection and due process objections.[7] The question of Dr. Rogers' First Amendment rights were not briefed below. Defendants should be given the opportunity to research and brief this new issue based upon a firm foundation of evidence gathered for that purpose. It would be imprudent for this Court to consider this issue here, for the first time, without the proper foundation of evidence and briefing in the court below. The matter would be best raised in a separate lawsuit.

d. *The court below did not address the issue.* Because the issue was never raised in the court below and because

[7]Dr. Rogers is in error to assert that TOA briefed the First Amendment issue as it applied to Dr. Rogers. In TOA's brief in the court below, the many issues of the lawsuit were broken down in chart form as to statute, the constitutional challenge, and the party asserting the challenge. (TOA brief, pp. 2-3). From this chart and from the text of the brief it is clear that only Senior Citizens asserted any First Amendment challenge to §2.02.

evidence, briefs, and arguments on the issue were not presented, the court quite naturally did not address the issue in its option and judgment below. The court did address the question of whether Dr. Rogers' equal protection or due process rights had been violated. And the court did address the assertion by Senior Citizens that its First Amendment rights to commercial information were infringed. But the simple fact is that the issue of a possible violation of Dr. Rogers' First Amendment rights of free speech and association was not tried in the court below. Since the issue was not pleaded in the court below, since the Defendants were not given the opportunity to present evidence on this issue, and since the issue had not previously been argued or briefed, it would not be fair to the parties involved to try this issue for the first time at this high appellate level. This Honorable Court should decline to consider this new issue.

2. *Section 2.02 does not impair Dr. Rogers' rights to free speech and association.* Even if this Court should determine that the question of Dr. Rogers' rights to free speech and association are properly before this Court, §2.02 does not impair those rights. Dr. Rogers alleges that his First Amendment rights are impaired by §2.02 because he is forced to make a choice between either the free exercise of his rights to speech and association or the opportunity to be a member of the "majority" of the Optometry Board. He asserts that because he is forced to make this choice, §2.02 is unconstitutional as violating the First Amendment. This analysis is incorrect.

a. *Dr. Rogers is not precluded from "majority" membership.* The entire basis of Dr. Rogers' First Amendment argument is that §2.02 somehow forces him to forego his First Amendment rights if he wishes to serve

on the "majority" of the Optometry Board. It is important to note that Dr. Rogers is not asserting that the opportunity to serve on the board is denied him, or that he must forego any rights before he can be appointed to the board. His only argument is that he is somehow deprived of being part of the majority on the board.

The fundamental error of Dr. Rogers' assertion is that the monolithic "majority" Dr. Rogers seeks to join does not exist. The Texas Optometry Act created a board composed of six members. Four of the six positions on the board must be filled by individuals who meet the qualification of belonging to an optometric association affiliated with the American Optometric Association, i.e., to the T.O.A. Section 2.02 does not require that the four individuals who belong to TOA must vote alike or that the four must vote against the two non-TOA members. Each individual is sworn to vote his conscience with the best interest of the State in mind at all times. *Section 2.02 does not require that a particular board member ever vote a particular way.*

As a result there is no absolute, unchanging "supermajority" as Dr. Rogers alleges. The "majority" of the Texas Optometry Board varies with each vote that is taken and with each issue that is considered by the board. As to any particular issue or any particular vote, an Optometry Board member may find himself in the majority or minority of the board. Whether or not he finds himself in the majority has nothing to do with his membership or non-membership in TOA.

In his twenty years on the board, Dr. Rogers has himself been in the majority on numerous occasions and

in the minority on other occasions. Similarly, any particular TOA member has found himself in the minority on some occasions, while in the majority on others.

Dr. Rogers' assertion that he is deprived of the opportunity to be on the "majority" of the board is essentially meaningless since the majority varies from issue to issue and vote to vote. Consequently, his argument that he must abdicate his First Amendment rights in order to become a part of that majority is likewise unsound and should not serve as a basis for declaring §2.02 unconstitutional.

b. *Dr. Rogers' right to commercial free speech is not impaired.* Assuming, however, that there were some right to be on the "majority" of the Optometry Board, Dr. Rogers is incorrect in asserting that he must forego his right to commercial free speech in order to be on that majority. Dr. Rogers asserts that to be a member of TOA or AOA, one must abdicate his right to advertise. This is absolutely wrong.

The TOA By-laws and Code of Ethics do not prohibit members from advertising or making any other lawful exercise of their First Amendment rights. While in pre-*Bates* days, TOA members did emphasize non-advertising, that emphasis has been eliminated and the TOA bylaws now leave members free to advertise or not advertise as they choose.[8] The TOA By-laws and Code of Ethics

[8]The text of Article XIV of the current TOA By-laws defining "professional conduct" is reproduced in the appendix of this brief at page 58. Also, the TOA Code of Ethics, is reproduced at page 59. Furthermore, note that there are no limits whatsoever to member advertising. The "practice evaluation system" complained of in Appellant's Brief at page 24 was discontinued by TOA in May of 1974.

make no reference one way or another to advertising, and the decision to advertise or not is completely left with the individual optometrist. A member of TOA does not, as Dr. Rogers asserts, abdicate any rights to advertise or to otherwise exercise his free speech right.

Similarly, as the American Optometric Association pointed out in its Amicus Curiae brief filed with this Court, the AOA does not limit advertising or restrict communication of commercial information by its members. Again, it is true that at one time AOA discouraged advertising by its members (see the old AOA Code of Ethics and Supplements at A-IV, 399-416). However, AOA like TOA has changed with the times, and now leaves the decision to advertise or not solely in the hands of the individual optometrist. The only reference to advertising in the current AOA Standards of Conduct reads "an optometrist should honor the applicable provisions of valid state and federal rules regarding the advertising of ophthalmic materials and the disseminating of information regarding professional services." (American Optometric Association Amicus Curiae brief, page 17). Consequently, neither membership in AOA or TOA forces a member to abrogate his First Amendment rights as Dr. Rogers alleges.

Since optometrists are not forced to sacrifice their First Amendment rights upon joining TOA, Dr. Rogers is incorrect to assert that §2.02 forces him to abdicate his right to commercial free speech.

c. *Dr. Rogers' rights to association are not impaired.* Dr. Rogers' next assertion is that §2.02 violates his First Amendment rights of free association. He argues that if he either chooses to associate with a group other than

TOA or if he simply chooses *not* to associate with TOA, then he is precluded from being on the "majority" of the Board. This assertion is also incorrect.

Dr. Rogers is incorrect to assert that he loses the opportunity to be on the "majority" of the Board if he chooses to associate with a group other than TOA. This assertion is apparently based upon the assumption that if Dr. Rogers chooses to join another association, he is precluded from joining TOA. This is simply not true. There is nothing that prohibits members of TOA from belonging to any other professional optometric association or to any other organizations of any kind. As has been pointed out previously, there are several members of TOA who also belong to the other state optometric association, TAO. Membership in TOA does not in any way restrict an optometrists' right to be associated with any other group. Consequently, the first infringement alleged by Dr. Rogers, i.e., that in order to become a member of TOA one must forego the right to associate with other groups, is without merit.

Dr. Rogers' next assertion is that, in order to be a member of the majority on the Optometry Board, he is forced to associate with TOA, and that thereby his freedom not to associate is impaired. This also is erroneous. As has been pointed out previously, if Dr. Rogers chooses not to associate with TOA he is not precluded from the opportunity of serving on the Optometry Board. This is graphically demonstrated by the fact that Dr. Rogers is currently serving on the Board and has been for years. Furthermore, his right to serve on the "majority" is not imparied, since, as has been previously pointed out, the majority of the board is not an absolute

and unchanging thing. It shifts with each vote and each issue. Dr. Rogers has, in fact, been a member of the "majority" of the board on numerous occasions without sacrifice of any freedom of association.

However, assuming that Dr. Rogers does have some right *not* to associate with TOA, and assuming that his right is somewhat impaired by requiring that 4 of the 6 Optometry Board members belong to TOA, Dr. Rogers' rights are not being impaired significantly enough to warrant declaring §2.02 unconstitutional. The only harm he suffers when he chooses to assert his right not to associate with TOA is the very vague and questionable harm of not being able to be a member of the theoretical "majority" of the Optometry Board. This vague and theoretical harm is hardly significant enough to outweigh the state interests served by §2.02 which were enumerated in the first section of this brief. This Court should not declare §2.02 unconstitutional as violative of Dr. Rogers association rights on such a basis.

In summary, even if this Court were to determine that the question of Dr. Rogers' First Amendment rights were properly raised in the court below, the merits of the case show that no violation has occurred. Any alleged infringement supposedly occurs by virtue of requiring an optometrist to choose between "majority" membership on the board and his First Amendment rights. This argument falls flat when one realizes that the first choice, majority membership on the board, is actually artificial. TOA membership does not dictate that such member is part of the majority in any given instance. The majority varies from issue to issue and vote to vote. Furthermore, the supposed abdication of First Amendment rights al-

leged by Dr. Rogers does not in fact occur. As has been shown, membership in TOA and AOA is not conditioned upon non-advertising or upon the sacrifice of any free speech or associational rights. Furthermore, Dr. Rogers' First Amendment associative rights are not significantly impared by §2.02. Consequently, §2.02 does not unconstitutionally infringe on Dr. Rogers' First Amendment rights.

C. *Recent FTC rules have mooted the First Amendment questions raised by §2.02.* On May 24, 1978, the Federal Trade Commission issued regulations which directly affect and moot the First Amendment questions raised in this lawsuit.[9] Those regulations, which went into effect in July of 1978, prohibit any person from limiting in any way the use of newspapers, telephone directories, window displays, signs, television, radio, or any other medium to communicate to the public any information concerning the cost and availability of ophthalmic goods or services. The regulations provide that any state laws which do limit such dissemination of information are preempted, and the rules prohibit state officials from enforcing any such laws. The Regulations further provide that no professional optometric association may in any way limit advertising or other communications by its members, and such associations may not condition membership upon any agreement which limits advertising in any way.

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[9]Federal Register, Vol. 43, No. 107, p.23992 at 24006-24008, (June 2, 1978), Trade Regulation Rules — Advertising of Opthalmic Goods and Services. For the convenience of the Court these rules have been reproduced in the appendix to this brief at page 60.

These Regulations, which prohibit any person from limiting an optometrist's freedom to disseminate commercial information, have mooted the First Amendment questions raised by Dr. Rogers and Senior Citizens against §2.02. The members of the Texas Optometry Board could not prevent an optometrist from exercising his First Amendment rights now even if they wanted to. The board members are prohibited from enforcing any state laws or taking any other action which might have the effect of limiting communication in any way. Whether or not a board member belongs to an association which is supposedly hostile to advertising now becomes irrelevant since board members no longer have the right to enforce any limits on advertising.

Similarly, for First Amendment purposes, it becomes irrelevant whether or not a board member belongs to any particular professional association since *all* associations are now prohibited from limiting advertising and from conditioning membership on non-advertising.

With the implementation of these new FTC regulations, any infringement on Plaintiff's First Amendment rights which might have resulted from §2.02 is prevented. The provisions of §2.02 of the Texas Optometry Act, no longer have even the slightest effect on Plaintiff's First Amendment rights to free speech. Therefore, any First Amendment objection to §2.02 is rendered moot.

IV. SENIOR CITIZENS' SUPREMACY CLAUSE/ SHERMAN ANTI-TRUST ASSERTION IS IMPROPERLY RAISED AND WITHOUT MERIT.

A. *Appellant's arguments are fallacious.* In Appellant's brief on the merits in this Court, Senior Citizens raises,

admittedly for the first time at any stage of this case, the assertion that §2.02 is invalid as violating the Supremacy Clause and the Sherman Anti-Trust Act. Senior Citizens alleges that the Sherman Act prohibits private restraints on trade, that TOA restrains trade because it supposedly prohibits its members from advertising, that the State of Texas "bestows the powers of government" on TOA through §2.02, and that therefore, §2.02 is in conflict with the Sherman Act and is therefore, invalid under the Supremacy Clause. This argument is totally without merit.

Speaking briefly to the merits, it is enough to say that neither TOA nor AOA prevent its members from advertising and that the FTC rules prohibit such in any event. (See Section III of this brief, *supra.*) Consequently there is not and cannot be a resulting restraint of trade. Furthermore, the State of Texas does not "bestow the powers of government" on TOA. The six members of the Texas Optometry Board are appointed by the governor and confirmed by the Senate. TOA does not select the Board nor run it in any way. Finally, for the Supremacy Clause to invalidate a state law, there must be a clear and definable conflict between the state and federal laws, *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 45 (1966). Section 2.02, which sets qualifications for membership on a state board, and the Sherman Act, which prevents private restraints on trade, do not evidence the clear conflict which invokes supremacy clause analysis.

B. *This issue was not raised in Appellant's Jurisdictional Statement.* As Senior Citizens' readily admits, this issue has never before been raised at any stage of this

case. Not only was the issue not pleaded, briefed, or argued in the court below, but *it was not raised in Appellants Jurisdictional Statement.* This Court has not agreed to hear this issue, the issue has very little relevance to any constitutional analysis of this statute, and refusal by this Court to hear the issue would not prejudice Plaintiff's rights to assert such complaint in a separate lawsuit. Consequently, this Court should not permit Plaintiff to assert for the first time at this high appellate level a new and totally unrelated challenge to §2.02.

PRAYER

On the basis of the foregoing analysis, Appellee Texas Optometric Association, Inc. respectfully urges that this Honorable Court affirm the judgment of the lower court with respect to this appeal on the constitutionality of §2.02.

Respectfully submitted,
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By Larry Niemann
Larry Niemann
Attorneys for Appellee Texas
Optometric Association, Inc.

Certificate of Service

I hereby certify that a true and correct copy of this brief has been deposited in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to Robert Q. Keith, attorney for Dr. N. Jay Rogers, 1400 San Jacinto Building, Beaumont, Texas 77701, Brian R. Davis, attorney and W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, 408 First Federal Plaza, 200 E. 10th Street, Austin, Texas 78701, John G. Tucker, attorney for Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, Dr. Sal Mora, individually, P. O. Box 1751, Beaumont, Texas 77704, Dorothy Prengler, Assistant Attorney General of Texas, attorney for Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, and Dr. Sal Mora, in their official capacity as members of the Texas Optometry Board, Supreme Court Building, P. O. Box 12548, Austin, Texas 78711, and Victor J. Rogers, II, 3434 One Allen Center, Houston, Texas 77002, on this 18th day of August, 1978.

Larry Niemann

Larry Niemann

APPENDIX

Summary of Past Litigation Involving Attacks On Validity Of Optometry Law

Broughton v. Pray, No. 99,567 In the 53rd District Court of Travis County, Texas (1954). Commercial optometrist (Texas Optical) sought to invalidate the first rules adopted by the Board prohibiting assumed name practice, advertising, window displays, etc. The district court held all of the rules valid.

Rogers v. Pray, No. D-67812 In the District Court of Jefferson County, Texas (1954). Commercial optometrist (TSO) sued the Board asking $250,000 damages and an injunction from enforcing the Optometry rules. The case was dismissed after three years for want of prosecution.

Carp v. Texas State Board of Examiners in Optometry, No. 95843-B In the 44th Judicial District Court of Dallas County, Texas (1954). Commercial optometrists (Lee Optical) sought to enjoin enforcement of all of the optometry rules and sought $2,250,000 in damages. Upon being put to trial, the commercial optometrists took a non-suit and the case was dismissed.

Shannon v. Baber, No. 11,325B In the 44th Judicial District of Dallas County, Texas and No. 104,397 In the 126th Judicial District Court of Travis County, Texas (1956). Commercial optometrists (Lee Optical) sued to enjoin enforcement of the basic competence rule, the Corporate Practice rule and the Bait Advertising rule and for $2,500,000 damages. After a venue trial in Dallas County, the case was transferred to Travis County where the commercial optometrists took a non-suit.

Kee v. Baber, 303 S.W.2d 376 Tex. Sup. Ct. (1957). Commercial optometrist (with Lee Optical) challenged validity of Basic Competence Rule, the Corporate Practice Rule, and the Bait Advertising Rule. The Supreme Court upheld the rules.

Carp v. Texas State Board of Examiners in Optometry, No. 108,976 In the 126th Judicial District of Travis County, Texas (1958). Commercial optometrist (Lee Optical) sued to enjoin enforcement of the corporate practice rule. The case was dismissed on motion of the Plaintiffs.

Texas State Board of Examiners in Optometry v. Carp, 343 S.W.2d 242 (Sup. Ct. Tex. 1961) The Board sued to enjoin a commercial optometrist from permitting his employees to practice optometry without a license. The commercial optometrist cross-claimed seeking to enjoin the Board from enforcing any optometry law against him, including those dealing with advertising and practicing in a non-partitioned office. The Supreme Court ruled for the optometry board and against the commercial optometrist.

Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex. Sup. Ct. 1967). Commercial Optometrists (Lee Optical owner) sued to have the Professional Responsibility Rule declared invalid. After seven years in court and two trips to the Supreme Court of Texas, the Professional Responsibility Rule was upheld.

Rogers v. Burton, 496 S.W.2d 673 (Tex. Civ. App. 1973). Commercial optometrist sued to declare invalid the Board interpretation of the Optometry Act grandfather clause regarding an optometrist leasing from an optician . The trial court and appeals court held the interpretation valid.

Burton v. Rogers, 504 S.W.2d 404 (Tex. Sup. Ct. 1974). Commercial optometrists (Dr. Rogers, TSO) challenged validity of Board interpretation of §5.09(a) prohibiting optometrists from advertising "reference to price." The case went to the Texas Supreme Court on a venue question which the Commercial optometrists lost.

Texas Optometry Board v. Lee Vision Center, 515 S.W.2d 380 (Tex. Civ. App. 1974, Writ ref. n.r.e.). A commercial optometrist (Lee Optical) challenged validity of Board interpretation of §5.09(a), prohibiting optometrists from advertising "reference to price." The Court held Board interpretation of statute was valid and enforceable.

Rogers v. Friedman et al, No. B-75-277-CA in the U.S. District Court in Beaumont (1975). Commercial optometrist (TSO) seeks to declare unconstitutional AOA affiliation requirement, trade name prohibition, full disclosure in referrals by optometrists, and price advertising prohibition for optometrists. Case still pending.

Fried et al v. Sticksel et al, No. CA-76-0377-G in the U.S. District Court in Dallas (1976). Commercial optometrist (Lee Optical) and TAO (commercial optometry association) sought to declare the continuing education statute unconstitutional. Case dismissed by plaintiffs.

Shropshire v. Sticksel, No. CA3-76-1180-G in the U.S. District Court in Dallas (1976). Commercial optometrist (Lee Optical) seeks to declare invalid the Board's memorandum opinion prohibiting optician signs from overlapping an optometrist's office. Case still pending.

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STATE OF TEXAS

COUNTY OF TRAVIS

AFFIDAVIT

On July 25, 1976, the Board of Directors of the Texas Optometric Association, Inc., initiated action to change the membership requirements of TOA regarding advertising. Such action was culminated on May 5, 1978, when the TOA House of Delegates overwhelmingly voted to amend the TOA By-Laws to completely revise Article XIV, which outlines the TOA standards of professional conduct. A true and correct copy of Article XIV as revised is attached. The revised by-laws eliminate all restrictions on advertising that previously existed in the TOA By-Laws. Also attached is a true and correct copy of the TOA Code of Ethics which was reaffirmed in its entirety by the TOA House of Delegates on May 5, 1978.

As attorney for the Texas Optometric Association, Inc., I have personal knowledge that the above stated facts are true, and I do so affirm.

Larry Niemann

Larry Niemann

Sworn to and subscribed before me by Larry Niemann, Attorney for the Texas Optometric Association, Inc., on this 15th day of August 1978

(SEAL)

Fred Niemann Jr

Notary Public in and for
Travis County, Texas

BY-LAWS
OF THE
TEXAS OPTOMETRIC ASSOCIATION, INCORPORATED

Revised 5/78

Article XIV
Professional Conduct

Section 1. The Texas optometry laws, as amended from time to time, shall be complied with by members of this Association. Optometry laws shall include statutes and interpretations thereof by the courts and the Texas Optometry Board.

Section 2. The Code of Ethics of this Association, as amended from time to time, shall serve as a guide for the professional conduct of the members of this Association.

Section 3. The Standards of Conduct of the American Optometric Association, as amended from time to time, shall serve as a guide for the professional conduct of the members of this Association. In such Standards of Conduct, the terms "shall" and "should" are to be construed as setting forth "recommended" standards rather than "mandatory" standards of conduct except where state optometry laws require standards of conduct to be mandatory.

Section 4. If a member willfully violates any state optometry law and/or interpretations thereof, or if a member willfully violates the Code of Ethics, Constitution, or By-Laws of this Association, it shall be considered unprofessional conduct.

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CODE OF ETHICS

It shall be the Ideal, the Resolve, and the Duty of the members of the Texas Optometric Association, Inc.;

To keep the visual welfare of the patient uppermost at all times;

To promote in every possible way, in collaboration with this Association, better care of the visual needs of mankind;

To enhance continuously their education and technical proficiency to the end that their patients shall receive the benefits of all acknowledged improvements in visual care;

To see that no worthy person shall lack for visual care, regardless of his financial status;

To advise the patient whenever consultation with an optometric colleague or reference for other professional care seems advisable;

To hold in professional confidence all information concerning a patient and to use such data only for the benefit of the patient;

To conduct themselves as exemplary citizens;

To maintain their offices and their practices in keeping with professional standards;

To promote and maintain cordial and unselfish relationships with members of their own profession and of other professions for the exchange of information to the advantage of mankind.

(Adopted at 47th Annual Convention of TOA, April 20, 1947)

(Reaffirmed at 78th Annual Convention of TOA, May 5, 1978)

FTC REGULATIONS PROMULGATED MAY 24, 1978

Federal Register, Vol. 43, No. 107, p.23992 at 24006-24008, (June 2, 1978), Trade Regulation Rules — Advertising of Opthalmic Goods and Services.

§456.1 *Definitions*

(a) A *"buyer"* is any person who has had an eye examination.

(b) The *"dissemination of information"* is the use of newspapers, telephone directories, window displays, signs, television, radio, or any other medium to communicate to the public any information, including information concerning the cost and availability of a product or service.

(c) An *"eye examination"* is the process of determining the refractive condition of a person's eyes or the presence of any visual anomaly by the use of objective or subjective tests.

(d) *"Ophthalmic goods"* consist of eyeglasses, or any component of eyeglasses and contact lenses.

(e) *"Ophthalmic services"* are the measuring, fitting, and adjusting of ophthalmic goods to the face subsequent to an eye examination.

(f) A *"person"* means any party over which the Federal Trade Commission has jurisdiction. This includes individuals, partnerships, corporations, and professional associations.

(g) A *"prescription"* is the written specifications for ophthalmic lenses which are derived from an eye examination. The prescription shall contain all of the information necessary to permit the buyer to obtain the necessary ophthalmic goods from the seller of his choice. In the case of a prescription for

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contact lenses, the refractionist must include in the prescription only those measurements and directions which would be included in a prescription for spectacle lenses.

All prescriptions shall include all of the information specified by state law, if any.

(h) A *"refractionist"* is any Doctor of Medicine, Osteopathy or Optometry or any other person authorized by state law to perform eye examinations.

(i) A *"seller"* is any person, or his employee or agent, who sells or provides ophthalmic goods and services directly to the public.

§456.2 *Private Conduct*

(a) It is an unfair act or practice for sellers to fail to disseminate information concerning ophthalmic goods and services notwithstanding state or local law to the contrary. *PROVIDED:* Violation of this subpart by any seller acting alone shall not be deemed to be a violation of Section 5(a)(1) of the Federal Trade Commission Act.

To prevent this unfair act or practice, any seller may engage in the dissemination of information concerning opthalmic goods and services subject to the limitations expressed in Section 456.5 below.

(b) It is an unfair act or practice for refractionists to fail to disseminate information concerning eye examinations notwithstanding state or local law to the contrary. *PROVIDED:* Violation of this subpart by any refractionist acting alone shall not be deemed to be a violation of Section 5(a)(1) of the Federal Trade Commission Act.

To prevent this unfair act or practice, any refractionist may engage in the dissemination of information concerning eye

examinations. Nothing in this subpart shall excuse a refractionist from compliance with any state or local law which permits the dissemination of information concerning eye examinations, including information on the cost and availability of those examinations, but requires that specified affirmative disclosures also be included.

§456.3 *Public Restraints*

It is an unfair act or practice under Section 5 of the Federal Trade Commission Act for any state or local governmental entity or any subdivision thereof, state instrumentality, or state or local governmental official to enforce any:

(a) prohibition, limitation or burden on the dissemination of information concerning ophthalmic goods and services by any seller or group of sellers, or

(b) prohibition, limitation or burden on the dissemination of information concerning eye examinations by any refractionist. *PROVIDED:* Nothing in subpart (b) shall be construed to prohibit the enforcement of a state or local law which permits the dissemination of information concerning eye examinations, including information on the cost and availability of those examinations, but requires that specified affirmative disclosures also be included.

Violation of subparts (a) and (b) shall not be deemed for purposes of Section 5(m)(1)(A) or Section 19 of the Federal Trade Commission Act to be a violation of Section 5(a)(1) of the Act.

§456.4 *Conformance to State Law*

It is an unfair act or practice under Section 5 of the Federal Trade Commission Act:

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(a) for any seller to reduce, limit, or burden the dissemination of information concerning ophthalmic goods and services in order to comply with any law, rule, regulation or code of conduct of any nonfederal legislative, executive, regulatory or licensing entity or any other entity or person, which would have the effect of prohibiting, limiting, or burdening the dissemination of this information, or

(b) for any refractionist to reduce, limit, or burden the dissemination of information concerning eye examinations in order to comply with any law, rule, regulation or code of conduct of any nonfederal legislative, executive, regulatory or licensing entity or any other entity or person, which would have the effect of prohibiting, limiting, or burdening the dissemination of this information. *PROVIDED:* To the extent that a state or local law, rule, or regulation permits the dissemination of information concerning eye examinations, including information on the cost and availability of those examinations, compliance with that law or regulation shall not be construed to reduce, limit or burden the dissemination of information concerning eye examinations.

§456.5 *Permissible State Limitations*

(a) To the extent that a state or local law, rule, or regulation requires that any or all of the following items be included within any dissemination of information concerning ophthalmic goods and services, such a law, rule, or regulation shall not be considered to prohibit, limit, or burden the dissemination of information:

(1) whether an advertised price includes single vision and/or multifocal lenses;

(2) whether an advertised price for contact lenses refers to soft and/or hard contact lenses;

(3) whether an advertised price for ophthalmic goods includes an eye examination;

(4) whether an advertised price for ophthalmic goods includes all dispensing fees; and

(5) whether an advertised price for eyeglasses includes both frames and lenses.

(b) Where a state or local law, rule or regulation applies to all retail advertisements of consumer goods and services (including a law, rule, or regulation which requires the affirmative disclosure of information or imposes reasonable time, place and manner restrictions), such a law, rule, or regulation shall not be considered to prohibit, limit, or burden the dissemination of information.

(c) If, upon application of an appropriate state or local governmental agency, the Commission determines that any additional requirement of any such state or local governmental agency deemed by that agency to be necessary to prevent deception or unfairness is reasonable and does not unduly burden the dissemination of information, then that requirement shall be permitted to the extent specified by the Commission.

§456.6 *Private Restraints*

(a) It is an unfair act or practice for any person, other than a state or a political subdivision or agency thereof, to prohibit, limit or burden:

(1) the dissemination of information concerning ophthalmic goods and services by any seller;

(2) the dissemination of information concerning eye examinations by any refractionist. *PROVIDED:* Nothing in this subpart shall be construed to prohibit any person from impos-

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ing reasonable affirmative disclosure requirements on the dissemination of information concerning eye examinations.

(b) Any organization or association which is not composed primarily of sellers and/or refractionists, which adopts or enforces self-regulatory guidelines for the dissemination of information which apply to all retail advertisements of consumer goods and services, shall not be deemed to be in violation of this subpart.

(c) The conditioning of membership in a professional or trade association of sellers or refractionists on a requirement that members or prospective members of that association not engage in the dissemination of information concerning ophthalmic goods and services be advertised only in a prescribed manner shall be deemed to prohibit, limit or burden the dissemination of that information.

§456.7 *Separation of Examination and Dispensing*

In connection with the performance of eye examinations, it is an unfair act or practice for a refractionist to:

(a) fail to give to the buyer a copy of the buyer's prescription immediately after the eye examination is completed. *PROVIDED:* A refractionist may refuse to give the buyer a copy of the buyer's prescription until the buyer has paid for the eye examination but only if that refractionist would have required immediate payment from that buyer had the examination revealed that no ophthalmic goods were required;

(b) condition the availability of an eye examination to any person on a requirement that that person agree to purchase any ophthalmic goods from the refractionist;

(c) charge the buyer any fee in addition to the refractionist's examination fee as a condition to releasing the prescription to

the buyer. *PROVIDED:* A refractionist may charge an additional fee for verifying ophthalmic goods dispensed by another seller when the additional fee is imposed at the time the verification is performed; or

(d) place on the prescription, or require the buyer to sign, or deliver to the buyer a form or notice waiving or disclaiming the liability or responsibility of the refractionist for the accuracy of the eye examination or the accuracy of the ophthalmic goods or services dispensed by another seller.

§456.8 *Federal or State Employees*

Nothing in this part shall be construed to prohibit any federal, state or local government entity from adopting and enforcing standards or requirements concerning the dissemination of information and release of prescriptions by sellers or refractionists employed by those governmental entities.

§456.9 *Declaration of Commission Intent*

(a) It is the purpose of this part to allow retail sellers of opthalmic goods and services to disseminate information concerning those goods and services in a fair and nondeceptive manner to prospective purchasers. This part is intended to eliminate certain restraints, burdens, and controls imposed by state and local governmental action as well as by private action on the dissemination of information, including advertising, concerning ophthalmic goods and services.

It is the intent of the Commission that this part shall preempt all state and local laws, rules, or regulations that are repugnant to this part, and that would in any way prevent or burden the dissemination of information by retail sellers of ophthalmic goods and services to prospective purchasers, except to the extent specifically permitted by this part. All

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state or local laws, rules, or regulations which burden the dissemination of information by requiring affirmative disclosures specifically addressed to ophthalmic goods and services are preempted, except for those specifically permitted by this part. State and local laws, rules, or regulations which apply to advertising of all consumer goods and services, including those that require affirmative disclosure of information, are not preempted.

(b) It is the Commission's intent that state laws which do not permit refractionists to disseminate information concerning eye examinations, including information concerning the cost and availability of those examinations, be preempted. State and local laws, rules or regulations which require affirmative disclosure of information in all disseminations of information concerning eye examinations are not preempted.

(c) The Commission intends this part to be as self-enforcing as possible. To that end, it is the commission's intent that this part may be used, among other ways, as a defense to any proceeding of any kind which may be brought against any retail seller of ophthalmic goods and services or refractionist who advertises in a nondeceptive and fair manner.

(d) It is not the Commission's intent to compel any seller or refractionist to disseminate information by virtue of this part. On the contrary, the provisions of this part are intended solely for the protection of those sellers and refractionists who want to disseminate information but have been restrained or prevented from advertising due to the prohibitions and restrictions of state and local laws and regulations, or by private action.

(e) In prohibiting the use of waivers and disclaimers of liability in Section 456.4(d), it is not the Commission's intent to impose liability on a refractionist for the ophthalmic goods

and services dispensed by another seller pursuant to that refractionist's prescription.

(f) In this part, the Rule, each subpart, and the Declaration of Commission Intent and their application are separate and severable.

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